No. 87-2098-ADX
Status: GRANTED

Title: Samuel K. Skinner, Secretary of Transportation, Appellant
v.
Mid-America Pipeline Company

Docketed:
June 23, 1988

Court: United States District Court for the Northern District of Oklahoma

Counsel for appellant: Solicitor General

Counsel for appellee: McMillan Jr.,Richard

Entry	Date	Note	Proceedings and Orders
1	Apr 26 1988		Application for extension of time to docket appeal and order granting same until June 23, 1988 (White, April 29, 1988).
2	Jun 23 1988	G	Statement as to jurisdiction filed.
3	Jul 27 1988		DISTRIBUTED. September 26, 1988
4	Jul 27 1988	X	Motion of appellee Mid-America Pipeline Co. to affirm filed.
5	Oct 3 1988		PROBABLE JURISDICTION NOTED.
			***
7	Nov 9 1988		Order extending time to file brief of appellant on the merits until December 1, 1988.
8	Nov 10 1988		Record filed.
		*	Certified copy of original record on appeal, 1 volume, received.
9	Dec 1 1988		Joint appendix filed.
10	Dec 1 1988		Brief of appellant Burnley, Secretary of Transportation filed.
12	Dec 8 1988		Order extending time to file brief of appellee on the merits until January 12, 1989.
21	Jan 3 1989		ARGUED.
13	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 1, 1989. (2ND CASE.)
14	Jan 11 1989		Brief amici curiae of Natl. Taxpayers Union, et al. filed.
15	Jan 11 1989		Brief amici curiae of Florida Power & Light Co., et al. filed.
16	Jan 12 1989		Brief amicus curiae of Chamber of Commerce of the U.S., et al. filed.
17	Jan 12 1989		Brief of appellee Mid-America Pipeline Co. filed.
18	Jan 24 1989		CIRCULATED.
19	Feb 10 1989	X	Reply brief of appellant Burnley, etc. filed.
20	Feb 22 1989	X	Supplemental brief of appellee Mid-America Pipeline Co. filed.
22	Mar 1 1989		ARGUED.

87-2098
No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Department of Transportation administers pipeline safety programs created by the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) directs the Secretary of Transportation to recover the costs of administering those two pipeline safety programs by assessing and collecting fees from pipeline operators. The question presented is whether Section 7005 represents an unconstitutional delegation of the legislative power of taxation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	4
The question is substantial	7
Conclusion	18
Appendix A	1a
Appendix B	14a
Appendix C	15a
Appendix D	17a

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 9, 10

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 6, 9

Bowsher v. *Synar*, 478 U.S. 714 (1986) 8

Currin v. *Wallace*, 306 U.S. 1 (1939) 10

District of Columbia v. *John R. Thompson Co.*, 346 U.S. 100 (1953) 10

FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 14

Field v. *Clark*, 143 U.S. 649 (1892) 9

Florida Power & Light Co. v. *United States*, No. 86-1512 (D.C. Cir. May 13, 1988) 8, 11

FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 17

FTC v. *R.F. Keppel & Bro.*, 291 U.S. 304 (1934) 11, 17

Head Money Cases, 112 U.S. 580 (1884) 13, 14

Industrial Union Dep't v. *American Petroleum Inst.*, 448 U.S. 607 (1980) 15

INS v. *Chadha*, 462 U.S. 919 (1983) 8

J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 6, 11, 12, 14

Lichter v. *United States*, 334 U.S. 742 (1948) 10, 11, 17

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 8

Cases—Continued: Page

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 10, 17
National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974) 12, 14-15
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932) 17
Opp Cotton Mills, Inc. v. *Administrator*, 312 U.S. 126 (1941) 16
Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) 9, 10
Springer v. *Government of the Phillipine Islands*, 277 U.S. 189 (1928) 8
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 10, 11
Synar v. *United States*, 626 F. Supp. 1374 (D.D.C.), aff'd, 478 U.S. 714 (1986) 8, 11
The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813) 9
United States v. *Grimaud*, 220 U.S. 506 (1911) 9
United States v. *Mazurie*, 419 U.S. 544 (1975) 10
United States v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939) 9, 16
United States v. *Sharpnack*, 355 U.S. 286 (1958) 10
Yakus v. *United States*, 321 U.S. 414 (1944) 8, 9, 10, 16, 17

Constitution and statutes:

U.S. Const.:
Art. I 2, 8, 10
§ 1 2
§ 8 . . . . . 2, 11
Art. II 8
§ 3 8
Art. III 8
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 . . . . . 2, 4
§ 7005, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) 2-4, 5, 6, 7, 8, 10, 14, 15, 16, 17
§ 7005(a)(1), 100 Stat. 140 . . . . . 2, 4, 15
§ 7005(a)(3), 100 Stat. 140 . . . . . 3, 4
§ 7005(b), 100 Stat. 140 . . . . . 3, 4
§ 7005(c), 100 Stat. 141 . . . . . 3, 4, 15

Statutes—Continued: Page

§ 7005(d), 100 Stat. 141 .... 3-4, 15
§ 7601(a), 100 Stat. 146-147 7

Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-375 5

Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* 4, 14, 15

Independent Offices Appropriation Act, 1952, 31 U.S.C. 9701 12

Internal Revenue Code (26 U.S.C.):
§ 1502 13
§ 4997 14

Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.* 4, 15

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-1891 7

28 U.S.C. 1252 1

Miscellaneous:

134 Cong. Rec. H3988-H3989 (daily ed. June 7, 1988) ... 1-2

51 Fed. Reg. (1986):
p. 25782 5
pp. 25782-25783 5
p. 25783 5
p. 46975 5
p. 46977 5

S. 952, 100th Cong., 2d Sess. (1988) 1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The findings and recommendations of the Magistrate (App., *infra*, 1a-13a) are unreported. The district court's order adopting the Magistrate's recommendations (App., *infra*, 14a) is also unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 15a-16a) was entered on February 9, 1988. A notice of appeal was filed on March 9, 1988 (App., *infra*, 17a-18a). On April 29, 1988, Justice White entered an order extending the time within which to docket this appeal to and including June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

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[1] Congress has passed a bill that repeals 28 U.S.C. 1252. See S. 952, 100th Cong, 2d Sess. (1988); 134 Cong. Rec. H3988-H3989 (daily ed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, of the Constitution provides, in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States * * *."

Article I, Section 8, provides, in pertinent part: "the Congress shall have Power To lay and collect Taxes, [and] * * * [t]o regulate Commerce * * * – And * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) provides:

PIPELINE SAFETY USER FEES.

(a) ESTABLISHMENT. –

(1) SCHEDULE. – The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) COLLECTION. – The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any Fed-

June 7, 1988). The President has not yet signed this bill. In any event, that legislation does not affect this case because Section 7 of the bill states that the law "shall take effect ninety days after the date of the enactment of this Act * * * [and] shall not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

eral, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) LIABILITY. – Fees established under this section shall be assessed to the persons operating –

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) TIME OF ASSESSMENT. – The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) USE OF FUNDS. – Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriation Acts, only –

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

(d) FEE SCHEDULE. – Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas

Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

STATEMENT

1. In 1986, Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82. Section 7005 of COBRA, 100 Stat. 140-141, directs the Secretary of Transportation (Secretary) to adopt a system of fees to cover the costs of federal pipeline safety programs administered by the Department of Transportation under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.*[2] Section 7005(a)(3), 100 Stat. 140, states that the fees "shall be assessed to the persons operating" pipeline facilities subject to the two safety Acts. The fees must be assessed prior to the end of each fiscal year (§ 7005(b), 100 Stat. 140), and must be sufficient to pay the costs of the two safety programs as "provided for in advance in appropriation Acts" (§ 7005(c), 100 Stat. 141). Section 7005(a)(1) of COBRA, 100 Stat. 140, directs the Secretary to "establish a schedule of fees based on the usage, in reasonable rela-

[2] Those acts, in general, authorize the Secretary to establish national pipeline safety standards and to ensure compliance with those standards through enforcement measures including inspections.

tionship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines."

2. On July 15, 1986, the Secretary published fee schedules adopted pursuant to Section 7005. See 51 Fed. Reg. 25782-25783 (1986). The Secretary selected "pipeline mileage" as the measure of each firm's fee, reasoning that that criterion is closely related to the covered regulatory costs (*e.g.*, the cost of inspections of pipelines). The Secretary further observed that the major pipeline trade associations had reached a consensus that "pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities." *Id.* at 25782, 46975, 46977. For fiscal year 1986, the Secretary established fees of $23.99 per mile of gas pipeline and $6.41 per mile of hazardous liquid pipeline (*id.* at 25783).[3]

3. Appellee Mid-America Pipeline Company owns and operates pipelines that transport hazardous liquids. As such, appellee is subject to the Hazardous Liquid Pipeline Safety Act (Complaint para. 3). On July 28, 1986, the Department of Transportation (DOT), acting pursuant to its published schedule of fees, assessed appellee $53,023.52 to cover its share of the costs of administering the safety act (*id.* para. 10). Appellee thereupon filed this suit, asserting that Section 7005 of COBRA is an unconstitutional delegation of the taxing power. The district court referred the parties' cross-motions for summary

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[3] The total costs of $7.773 million in that year for the two pipeline safety programs were allocated 80% to gas pipelines and 20% to hazardous liquid pipelines (51 Fed. Reg. 25783 (1986)). Total costs of both programs for fiscal year 1987 were $8.523 million, and for 1988 are projected to be $8.550 million. Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-375.

judgment to Magistrate John Leo Wagner for a recommended decision.

On August 5, 1987, the Magistrate issued findings and recommendations (App., *infra*, 1a-13a). The Magistrate stated that there were no genuine issues of material fact, and that two legal issues were presented: "(1) [W]hether the 'user fees' contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner" (*id.* at 1a-2a (footnote omitted)). The Magistrate concluded "that the 'fees' assessed under § 7005 are taxes" (*id.* at 5a). The Magistrate then discussed, but neither accepted nor rejected, appellee's contention that Congress is subject to special restrictions with respect to delegation of the taxing power relative to its other powers (*ibid.*). Instead, the Magistrate (*id.* at 6a-11a) purported to analyze Section 7005 in light of this Court's decisions in *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928), and *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946). The Magistrate found that Section 7005 leaves "the Secretary * * * free to appropriate the cost of regulation in almost any way [he] sees fit" (App., *infra*, 9a). By not specifying the fee schedules itself, the Magistrate declared, Congress has permitted the Secretary to charge a company "almost any figure from 0 - 100% of the entire [pipeline safety] appropriation" (*id.* at 10a).[4] The Magistrate accordingly concluded that Section 7005 is unconstitutional: "This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the

[4] The Magistrate referred to figures presented by appellee in oral argument and stated that Section 7005 allows the Secretary to charge appellee anywhere between 5% and 28.3% of the total appropriation (App., *infra*, 9a). The figures relied upon by the Magistrate were contained in an exhibit used by appellee that had in fact been ruled inadmissible (Mar. 25, 1987 Tr. of Oral Arg. 11-13).

Secretary of Transportation to use [his] discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes" (*ibid.*).

The Secretary filed exceptions to the Magistrate's report. On December 30, 1987, however, the district court entered a brief order (App., *infra*, 14a) adopting the Magistrate's recommendations. On February 9, 1988, the district court entered a judgment (*id.* at 15a-16a) declaring Section 7005 unconstitutional and enjoining the Secretary from enforcing that section against appellee.

THE QUESTION IS SUBSTANTIAL

Congress has in recent years enacted several provisions designed to recover the costs of particular regulatory programs through a system of fees imposed on those entities regulated under the program. In addition to the statute at issue in this case, which concerns the pipeline safety programs administered by DOT, Congress has also directed the Nuclear Regulatory Commission (NRC) to recover part of the costs of nuclear powerplant licensing and inspection programs through a system of fees (see COBRA § 7601(a), 100 Stat. 146-147) and has instructed the Federal Energy Regulatory Commission (FERC) to recover the costs of its regulatory programs through a system of fees (see Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-1891). The district court's decision in this case not only strikes down a statute that provides for the entire operating budget of DOT's two pipeline safety statutes (approximately $8.5 million per year), it also calls into question those other statutes and conflicts with a recent decision of the District of Columbia Circuit upholding NRC's new fee authority against a similar constitutional challenge. See

Florida Power & Light Co. v. *United States*, No. 86-1512 (May 13, 1988).[5] Moreover, the district court's judgment is demonstrably wrong. Section 7005 of COBRA is but one of many constitutional statutes that set forth "statutory standards" and call upon the Executive Branch "for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944). Thus, the Court should note probable jurisdiction.

1. a. As the Court observed in *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), the Constitution divides the federal government "into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." The legislative power granted by Article I "is the authority to make laws." *Springer* v. *Government of the Phillipine Islands*, 277 U.S. 189, 202 (1928). The executive power created by Article II is the authority to "take Care that the Laws be faithfully executed" (Art. II, § 3). And the judicial power conferred by Article III is the authority, in appropriate cases and controversies, "to say what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) and whether the law has been violated. The Framers intended that these separate functions would serve as "the foundation of a structure of government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

The so-called "non-delegation doctrine" is rooted in this principle of separation of powers. If each Branch of the federal government is to perform its assigned function,

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[5] The constitutionality of FERC's new fee authority is currently being challenged before the same district court that rendered the judgment in this case. See *Mid-America Pipeline Co.* v. *FERC*, Civil Action No. 87-C-571B (N.D. Okla.).

Congress must enact legislation that "delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority" (*American Power & Light Co.* v. *SEC*, 329 U.S. at 105). When Congress legislates in this manner, the Executive Branch is able "to understand the[] limits" of the law. *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574 (1939). And the Judicial Branch, when presented with a case challenging executive action, is able "to ascertain whether the will of Congress has been obeyed" (*Yakus* v. *United States*, 321 U.S. at 426). Consequently, as the Court noted in *Field* v. *Clark*, 143 U.S. 649, 692 (1892), the principle "[t]hat Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

b. Nevertheless, with one notable exception some 50 years ago, this Court has consistently rejected claims based on the non-delegation doctrine. During the first 150 years of its history, the Court uniformly held that challenged statutes did not unconstitutionally delegate legislative authority. See, *e.g., The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Field* v. *Clark, supra.* In two decisions rendered in 1935, however, the Court struck down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). The challenged provisions called for the creation of codes of fair competition for the entire economy, bypassed the normal administrative process, and "supplie[d] no standards for any trade, industry or activity" (*A.L.A. Schechter Poultry*, 295 U.S. at 541), creating what Justice Cardozo described as "a roving com-

mission to inquire into evils and upon discovery correct them" (*id.* at 551 (concurring opinion)). As such, the challenged provisions represented what was described as "delegation running riot" (*id.* at 553 (Cardozo, J., concurring)).

In the 53 years since *Schechter Poultry* was decided, the Court has uniformly upheld statutes challenged on nondelegation grounds. See, *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544 (1975); *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953); *Lichter* v. *United States*, 334 U.S. 742 (1948); *Yakus* v. *United States*, *supra; National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Currin* v. *Wallace*, 306 U.S. 1 (1939). Section 7005 of COBRA squarely falls within this tradition. It sets forth Congress's policy determination, and calls upon the Executive to implement that policy by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. at 421).

2. a. Appellee contended in the district court (App., *infra*, 5a) that Section 7005 is unconstitutional because it directs the Secretary of Transportation to establish a "tax," and the taxing power, according to appellee, is subject to stricter limitations on delegation than are the other powers of Congress. Although we disagree that Section 7005 creates a "tax" as that word is used in Article I of the Constitution (see pages 13-14, *infra*,), any dispute over what label should be attached to the monies collected pursuant to the Act is irrelevant. There is simply no basis in the text of the Constitution or this Court's decisions for the proposition that Congress may not confer discretion on the Executive in carrying out Congress's tax policies that have been duly enacted into law.

Article I, Section 8, of the Constitution sets forth the many powers of Congress. One of those powers is the "Power To lay and collect Taxes." The taxing power, however, is not distinguished from any of the other enumerated powers (*e.g.*, the power to borrow money or to regulate commerce) in terms of the extent to which Congress may call upon the Executive to exercise discretion in carrying out its policies. Thus, there is no textual basis for concluding that Congress may give the Executive authority to make subsidiary rules governing such matters as maximum prices (see *Sunshine Anthracite Coal Co.* v. *Adkins, supra*) or unfair competition (see *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304 (1934)), but not taxes. The Court recognized this point in *Lichter* v. *United States,* when it stated that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes" (334 U.S. at 778-779). Accord *Florida Power & Light Co.* v. *United States, supra* (rejecting claim that Congress's power to set rules relating to a tax is non-delegable); *Synar* v. *United States,* 626 F.Supp. 1374, 1385 (D.D.C.) (Scalia, Johnson, Gasch, JJ.) (rejecting contention that there are "core functions" that Congress may not delegate to the Executive), aff'd on other grounds, 478 U.S. 714 (1986).

Indeed, the Court's decision in *J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394 (1928), forecloses appellees's contention that Congress's power to tax is treated differently from other powers when deciding whether a statute represents an unconstitutional delegation. In *J.W. Hampton,* the Court considered a challenge to a statute giving the Executive broad authority to set tariffs (a type of tax) on imported goods. The Court rejected the argument that Congress may not "use executive officers in the application and enforcement of a policy declared in law by

Congress * * * where Congress has exercised the power to levy taxes and fix customs duties" (*id.* at 409). The Court stated (*ibid.*):

> The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Contrary to appellee's suggestion below, *J. W. Hampton* was not overruled by the Court in *National Cable Television Ass'n* v. *United States,* 415 U.S. 336 (1974). In that case, the Court considered the power of federal agencies to assess fees under the Independent Offices Appropriation Act, 1952, 31 U.S.C. 9701. In construing that statute, the Court distinguished between "taxes" and "fees," and noted that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power" (415 U.S. at 341). The Court then discussed the separation-of-powers principle of *Schechter Poultry* and *J. W. Hampton*: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems" (*id.* at 342). Thus, nothing in *National Cable Television Ass'n* casts doubt on the ability of Congress to pass a law that confers discretion on the Executive in matters related to raising revenue. In fact, *National Cable Television Ass'n* expressly notes that such a law, like any other statute challenged on non-delegation grounds, is

constitutional if it satisfies the principles announced in *Schechter Poultry* and *J.W. Hampton.*[6]

b. In any event, Section 7005 does not create a "tax." This is clear from the Court's decision in the *Head Money Cases,* 112 U.S. 580 (1884), in which the Court considered the constitutionality of a statute requiring ship owners to pay a duty of 50 cents for every non-citizen they transported to the United States. The money was used to pay the costs of administering the immigration laws. The Court, in rejecting a challenge to the statute as an unconstitutional tax, noted that "the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration" (*id.* at 595). For constitutional purposes, therefore, it is not necessary to identify a direct benefit conferred by the government in order to conclude that an exaction is a "fee" rather than a "tax"; a fee is also something which may properly be imposed on a party engaged in a particular activity in order to internalize costs imposed by that activity on the government or on society generally. The Court explained (*id.* at 595-596):

> The sum demanded of [the ship owner] is not * * * a tax or duty within the meaning of the Constitution.

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[6] The length of the Internal Revenue Code suggests that Congress often legislates with great precision in the area of taxation. But Congress has also chosen to give the Executive considerable discretionary authority in executing Congress's tax policies. For example, Congress has directed the Secretary of the Treasury to prescribe regulations for the filing of consolidated tax returns "in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability * * *" (26 U.S.C. 1502). And to ensure proper collection of the Windfall Profit Tax on oil companies, Congress has instructed the Secretary of the Treasury

> The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed.

Here, appellee is in the business of transporting hazardous liquids through pipelines. Appellee profits from that business, and Congress has rationally determined that appellee should bear some of the social costs of engaging in this inherently hazardous activity, specifically, the costs of administering the Hazardous Liquid Pipeline Safety Act. Accordingly, Section 7005 is simply an exercise of Congress's "regulation of commerce" (*Head Money Cases,* 112 U.S. at 595). Thus, even if the Constitution placed special limits on the ability of Congress to confer discretionary authority on the Executive in matters related to taxation, such limits would not apply in this case.

3. The constitutional test summarizing the separation-of-powers concerns applicable in this case was announced in *J.W. Hampton*: "If Congress shall lay down by legislative act an intelligible principle to which the [Executive] * * * is directed to conform, such legislative action is not a forbidden delegation of legislative power" (276 U.S. at 409). This test has been repeatedly cited by this Court as the proper measure for judging the validity of Congress's creation of discretionary authority within the Executive Branch. See, *e.g., FEA* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 559 (1976); *National Cable Television*

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to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter" (26 U.S.C. 4997).

Ass'n, 415 U.S. at 342; see also *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 685-686 (1980) (Rehnquist, J., concurring in the judgment). If that test is satisfied, each Branch performs its constitutionally appointed function: Congress enacts substantive policy into law, the Executive Branch can understand that policy and know its limits, and the Judicial Branch can judge whether the Executive is obeying the law.

Section 7005 of COBRA plainly sets forth "an intelligible principle to which the [Executive] * * * is directed to conform." Section 7005 directs the Secretary to assess and collect fees to cover the costs of administering the Hazardous Liquid Pipeline Safety Act and the Natural Gas Pipeline Safety Act. It requires that these fees be collected from persons operating facilities subject to the two pipeline safety statutes. The Secretary is instructed to collect funds "sufficient to meet the costs of [the] activities" of the two programs (§ 7005(d), 100 Stat. 141), and the fees may be used only "to the extent provided for in advance in appropriation Acts" (§ 7005(c), 100 Stat. 141); thus Congress sets the total amount of fees to be collected each year. And the Secretary may not exercise unbridled discretion in setting the amount of fees that each company must pay. Rather, the statute sets forth the exclusive factors that the Secretary may consider in creating the schedule—"volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines" (COBRA § 7005(a)(1)).

The Secretary's task, therefore, is clearly defined. He may not collect fees that exceed 105% of Congress's annual appropriations for the pipeline safety programs. He may not collect fees from persons who are not subject to either of the two safety acts. He may not use the funds for

purposes other than administering the two acts. He may not set fees on a case-by-case basis,[7] and he may not consider any factors other than the three criteria set forth in the statute. Plainly, this is not a statute that suffers from "an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus* v. *United States,* 321 U.S. at 426).

Nor is Section 7005 invalid merely because Congress did not itself establish detailed fee schedules. In *United States* v. *Rock Royal Co-Operative,* 307 U.S. 533 (1939), the Court upheld a statute authorizing the Secretary of Agriculture to set milk prices. The Court noted that Congress did not give the Secretary of Agriculture a "mathematical formula" but, rather, prescribed "the various factors to be considered by the Secretary" (*id.* at 577). Likewise, Congress in this case did not attempt to eliminate the Secretary's discretion entirely by legislating a specific formula; it reasonably set out the factors that the Secretary may consider in executing Congress's policy and left to "administrative judgment * * * the relative weights to be given to these factors." *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 145 (1941) (upholding statute authorizing Executive Branch to fix minimum wages).

The validity of Section 7005 is most evident when that statutory provision is compared to other statutes that the Court has upheld against a non-delegation challenge. The Court has upheld statutes authorizing the Executive to

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[7] Thus, the Magistrate clearly erred when he said that "the Secretary is given the power to *set* tax brackets or rates for *individual* pipeline companies" (App., *infra,* 10a (second emphasis added)).

recover excessive profits earned on military contracts (*Lichter* v. *United States,* 334 U.S. at 785), to set maximum prices that are generally fair and equitable (*Yakus* v. *United States,* 321 U.S. at 427), to set just and reasonable rates for natural gas (*FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944)), to license radio communications as public convenience, interest or necessity requires (*National Broadcasting Co.* v. *United States,* 319 U.S. at 225-226), to prohibit unfair methods of competition (*FTC* v. *R.F. Keppel & Bro.,* 291 U.S. at 310), and to approve consolidation of carriers when in the public interest (*New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24 (1932)). When compared to these other statutes, the Executive authority created under Section 7005 is quite modest—and plainly constitutional.

4. The district court concluded (App., *infra,* 10a) that Section 7005 is unconstitutional because the Secretary has discretion to select among three different criteria set forth in the statute in establishing a schedule of fees. But the court ignored the many limits that Congress placed on the Secretary before he was given some discretion in creating a fee schedule. Whenever Congress passes a statute conferring a measure of discretion on the Executive, at some level the agency charged with implementing the statute must exercise judgment in carrying out Congress's policy. But that fact does not give rise to a constitutional problem. As the Court noted in *Yakus* v. *United States,* 321 U.S. at 425-426, Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." So long as the statute meets the "intelligible principle" test of *J.W. Hampton,* the Constitution's requirement of separation of powers is satisfied.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1988

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civ. Action No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Filed Aug. 5, 1987]

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

The above-styled case was referred to the Magistrate for findings and recommendations on cross-motions for summary judgment. A hearing on the motions was held on March 25, 1987, at which time both sides presented oral arguments. Having carefully considered the motions, briefs, oral arguments and relevant legal authority, and Magistrate finds as follows:

Plaintiff Mid-America Pipeline Company brought this action seeking a declaratory judgment that § 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("the Act"), Pub. L. No. 99-272, 100 Stat. 82 (1986) is an unconstitutional delegation of the taxing power and an injunction prohibiting the Secretary of Transportation from enforcing or otherwise acting pursuant to the Act.

The parties concede that there is no genuine issue of material fact; the only issues involved here are legal ones:

(1) whether the "user fees" contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner.[1]

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[1] Section 7005 provides:

(a) Establishment. –

(1) Schedule. – The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) Collection – The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any federal, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) Liability. – Fees established under this section shall be assessed to the persons operating –

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) Time of Assessment. – The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) Use of Funds. – Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriate Acts, only –

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

With regard to the first issue, the Magistrate finds that the assessments contemplated by § 7005 are, in fact, taxes, not "fees based on usage".

In *National Cable Television Association v. United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), the Supreme Court explained the distinction between a "fee" and a "tax". There the Court stated:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. (Footnote omitted.)

Examples of fees which have survived constitutional challenge can be found in *Phillips Petroleum Co. v. F.E.R.C.*, 786 F.2d 370 (10th Cir. 1986) (fees charged for agency review of tariff filings and other requested services); *Nevada Power Co. v. Watt,* 711 F.2d 913 (10th Cir. 1983) (fees charged by agency for processing applica-

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(d) Fee Schedule.—Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

tions for rights-of-way); *Mississippi Power & Light v. U.S. Nuclear Regulatory Commission,* 601 F.2 223 (5th Cir. 1979) (fees charged by the agency for routine inspections necessary for issuance and retention of operating license.)

Where no request for an agency's services is made and no specific benefit is conferred upon the one being assessed, the assessment cannot be labelled a "fee". In *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984), the court held that mine reclamation fees under the Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. (1982), are in fact taxes because the "fee" does not confer a benefit on the operator different from that enjoyed by the general public when the environment is improved. Instead, the court likened the fee to an "involuntary exaction for a public purpose." 748 F.2d at 1106.

The Supreme Court in *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974), considered the validity of the Federal Power Commission's assessments under the Natural Gas Act and Federal Power Act, levied in an effort to recoup the Commission's costs of administering these Acts. There, the Court held that because the Independent Offices Appropriations Act of 1952, which authorizes the assessment of fees for services rendered by a government agency, covered only fees (not taxes), the Federal Power Commission could not charge fees to industry members which had neither asked for nor received services from the Commission. The Court agreed with the reasoning of the Court of Appeals for the District of Columbia that a fee covers only specific charges for specific services to specific individuals or companies. 415 U.S. at 349, 94 S.Ct. at 1154, 39 L.Ed.2d at 387.

The assessment under § 7005 is not "incident to a voluntary act", *National Cable, supra,* nor does it "bestow a benefit on the applicant not shared by other members of society." *Id.* It, too, could easily be likened to "an involuntary exaction for a public purpose," *United States v. River Coal, supra,* the purpose being the regulation of natural gas and hazardous liquid pipeline useage. Therefore, the Magistrate concludes that the "fees" assessed under § 7005 are taxes.

Having concluded that § 7005 imposes a tax upon persons operating all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001 et seq. (HLPSA), and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671 et seq. (NGPSA), the remaining issue is whether Congress's delegation of authority under this statute to the Secretary of Transportation amounts to an unconstitutional delegation of the taxing power.

Art. I, § 8, Cl. 1 of the United States Constitution states that "[t]he Congress shall have Power to lay and collect Taxes. . . ." From the Supreme Court's holding in *National Cable, supra,* plaintiff argues that any congressional delegation of revenue raising authority must be in the form of a fee, not a tax. Plaintiff directs the court's attention to several treatises on constitutional law and the history of the Taxing Power which declare that the taxing power is non-delegable, including J. Freedman, *Crisis & Legitimacy: The Administrative Process and American Government* (1978), wherein Professor Freedman explains that National Cable is one of a class of cases "in which the legislature seeks to delegate a power that may not be delegated, even though the legislature itself may exercise the power constitutionally. The Power of Congress to levy taxes . . . [is] of this character." *Id.* at 88.

The defendant, on the other hand, argues that Congress may delegate the taxing power in the same manner as it may delegate any other enumerated power. In support defendant cites *J. W. Hampton & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928), and *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

In *Hampton, supra,* the Supreme Court considered the constitutionality of § 315 of Title III of the Tariff Act of September 21, 1922, Ch. 356, 42 Stat. 858, 941, which authorized and directed the president to increase or decrease duties imposed by the Tariff Act, so as to equalize the differences which he found existing between the costs of producing at home and in foreign countries the types of goods and articles to which such duties apply.

The taxpayer petitioner argued that § 315 was an unconstitutional delegation to the president of the legislative power to lay and collect taxes and duties. In rejecting petitioner's argument, the Court first analyzed the purpose of § 315: to secure by law the imposition of customs duties on imported merchandise which would equalize the difference between the cost of producing goods abroad and producing the same goods in the United States. Although it may have been difficult from a practical standpoint for Congress to have determined what precise differences exist in the cost of goods, the Court found that § 315 of the Tariff Act clearly defined the difference which it sought to eradicate.

The delegation under § 315 was not a delegation of the taxing power; rather it was a delegation to the executive branch of the power to implement the tariff plan established by the legislature. As the Court explained:

> Congress adopted in § 315 the method of desribing with clearness what its policy and plan was and then authorizing a member of the executive branch to

carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan.

Congress may use executive officers to apply and enforce a policy or law set by Congress, including the application and enforcement of tax law. However, Congress may not delegate to any executive office or agency the authority or discretion to determine what the law shall be. *Hampton*, 276 U.S. at 408-409.

With these principles in mind, the *Hampton* Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

Nineteen years later, the Supreme Court, in *American Power & Light, supra,* considered and rejected a claim that § 11(b)(2) of the Public Utility Holding Company Act of 1935 was an unconstitutional delegation of legislative power to the Securities and Exchange Commission ("SEC"). Section 11(b)(2) provided that the SEC shall act so as to ensure that the corporate structure or continued existence of any particular company in a holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among the security holders." 329 U.S. at 104. American Power & Light Co. argued that the statute was unconstitutional because it did not set forth any standards to be used by the SEC in making its determination. The Court, however, found that the standards to be used in determining when holding company structures are unnecessarily complicated and when voting rights are inequitably distributed were readily ascertainable from the

Act itself: § 1(b)(c) of which set forth the general policy of the Act and Congress's legislative intent in passing the Act; § 7 which set standards for new security issues; and § 10 which addressed acceptable conditions for acquisition of properties and securities.

Section 11(b)(2) passed constitutional scrutiny because the Court determined that in drafting the statute Congress clearly delineated the general policy, the agency which was to apply it and the boundaries of the agency's authority under the statute.

Using *Hampton, supra,* and *American Power & Light, supra,* as guidelines, the Magistrate has examined the statute now in question, § 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985.

From the statute itself and its legislative history, the purpose of § 7005 is clear: to recover the total costs incurred by the Department of Transportation in administering the safety programs under the Natural Gas Pipeline Safety Act (NGPSA) and the Hazardous Liquid Pipeline Safety Act (HLPSA). All persons operating a pipeline subject to either the NGPSA or HLPSA are to be assessed a fee. The only statutory language which concerns the amount of the fee is found in Subsection (d) where it states that the aggregate fee for any fiscal year shall not exceed 105 percent of the appropriations passed by Congress for enforcement of the NGPSA and the HLPSA. The only directive given regarding the amount of the assessment to each user pipeline company is the statutory language that such fees shall be "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof", § 7005(a)(1).

Unlike *Hampton* and *American Power & Light,* this statute does not give any clear guidance as to how much money is to be assessed. The standard in *Hampton* was the difference in production costs at home and abroad. It was

not left in the executive officer's discretion to set a standard and then apply it. The president was only asked to apply a standard of duty measurement which had been carefully laid down by Congress.

The Magistrate finds that the statute does not define by sufficient criteria the amount of "tax" to be assessed to each "user" pipeline facility. Although the statute prescribes that the amount be "based on the usage, in reasonable relationship to volume-miles, miles, revenues or an appropriate combination thereof . . .", the fact is that the Secretary is free to appropriate the cost of regulation in almost any way she sees fit. Due to the loose language of the statute, there is a wide-ranging potential impact on the individual pipeline facilities.

Exhibit A demonstrates the disparity of assessment, depending upon what assessment criteria the Secretary uses. For example, based upon the 1985 totals of miles of pipeline, barrel miles, or gross revenues for a sample of pipeline corporations, if the Secretary based the § 7005 assessment solely on pipeline miles, plaintiff Mid-America would have been required to pay 28.3% of the total amount of the Congressional appropriation; if the assessment were based on barrel miles, Mid-America would have been charged 5.0% of the total appropriation; and if the Secretary used gross revenue as the assessment measure, Mid-America would have been assessed 12.2% of the total appropriation.

The same calculations as applied to the total 1985 figures for Colonial Pipeline Company illustrate that if the Secretary used pipeline miles as the assessment standard, Colonial would have been required to pay 18.5%; if barrel miles were the standard, Colonial would have been charged with 70.9% of the total appropriation; and if gross revenue were the standard, Colonial would have been assessed 49.4% of the total congressional appropria-

tion. Should the Secretary choose to use a combination of these standards, the percentage amount to be assessed each company could be almost any figure from 0-100% of the entire appropriation. Under this statutory scheme the Secretary is given the power to *set* tax brackets or rates for individual pipeline companies.

Defendant suggests that the power of the Secretary under the challenged statute is similar to that bestowed on the Internal Revenue Service under the Internal Revenue Code. Title 26 U.S.C. § 1 et seq. In that regard the Magistrate has examined the enabling legislation of the I.R.S. and finds that the function of the I.R.S. in implementing the federal tax laws is much more limited than the role of the Secretary of Transportation under § 7005 of the Omnibus Budget Act of 1985.

On July 1, 1862, Congress created the office of the Commissioner of Internal Revenue "for the purpose of superintending the collection of internal duties, stamp duties, licenses, or taxes imposed by this act, or which may be hereafter imposed, and of assessing the same. . . ." Tax Act, Ch. 119, 12 Stat. at Large 432 (1862). Congress then went on to specifically delineate the exact nature and amount of each tax, license, and duty which the Commissioner of Internal Revenue was to collect and assess.

Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes.

Without the Congressional guidance and direction given the I.R.S. in the Internal Revenue Code or found in the statutes considered in *Hampton* and *American Power & Light*, the Magistrate finds that § 7005 of the Omnibus

Budget Reconciliation Act of 1985 is an unpermissible delegation of the legislative power to assess taxes. Therefore, the Magistrate recommends that plaintiff's motion for summary judgment be granted and defendant's motion for summary judgment be denied.

Dated this 5th day of August, 1987.

/s/ John Leo Wagner

JOHN LEO WAGNER
United States Magistrate

EXHIBIT A

PERCENTAGE OF TOTAL APPROPRIATION

COMPANIES	MILES OF PIPELINE	BARREL MILES	GROSS REVENUE
Explorer Pipeline Company	1397	107,666,989,936	82,690,098
Mid-America Pipeline Company	8123	43,822,893,500	116,025,010
Colonial Pipeline Company	5301	626,190,935,768	468,152,311
Williams Pipeline Company	9210	53,885,600,000	149,729,978
Seminole Pipeline Company	774	21,209,045,800	28,526,191
Dixie Pipeline	1303	16,652,230,945	40,950,411
Sun Pipe Line Company	2569	14,192,870,801	61,469,468

(This data is based upon Form 6 filed with Federal Energy Regulatory Commission (1985).)

EXHIBIT A – Continued

PERCENTAGE OF TOTAL APPROPRIATION – Continued

COMPANIES	TAX % IF BASED ON MILES	TAX % IF BASED ON BBL MILES	TAX % IF BASED ON GROSS REVENUE
Explorer Pipeline Company	4.9%	12.2%	8.7%
Mid-America Pipeline Company	23.3%	5.0%	12.2%
Colonial Pipeline Company	18.5%	70.9%	49.4%
Williams Pipeline Company	32.1%	6.1%	15.8%
Seminole Pipeline Company	2.7%	2.4%	3.0%
Dixie Pipeline	4.5%	1.9%	4.3%
Sun Pipe Line Company	9.0%	1.6%	6.5%

(This data is based upon Form 6 filed with Federal Energy Regulatory Commission (1985).)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Filed Dec. 30, 1987]

ORDER

The Court has for consideration the Findings and Recommendations of the Magistrate filed August 5, 1987. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed and adopted by the Court.

It is so Ordered this 30th day of December, 1987.

s/ James O. Ellison

JAMES O. ELLISON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Entered Feb. 9, 1988]

JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action came before the Court, Honorable James O. Ellison, District Judge, presiding, on cross-motions for summary judgment, and the issues having been duly heard, and a decision having been duly rendered granting Plaintiff's Motion for Summary Judgment,

IT IS HEREBY ORDERED AND ADJUDGED

That Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law No. 99-272, 100 Stat. 82 (1986), is declared unlawful as violative of the United States Constitution, and

That Defendant Secretary of Transportation is permanently enjoined from enforcing as against Plaintiff Mid-America Pipeline Company Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law No. 99-272, 100 Stat. 82 (1986).

JUDGMENT IS ACCORDINGLY ENTERED FOR PLAINTIFF AND AGAINST DEFENDANT.

Dated at Tulsa, Oklahoma this 8th day of Feb. 1988.

/s/ James O. Ellison

JAMES O. ELLISON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civ. Action No. 86-C-815E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, DEFENDANT

[Filed Mar. 9, 1988]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant Secretary of Transportation hereby appeals to the Supreme Court of the United States from the JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF entered February 9, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Done this 9th day of March, 1988.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 27 1988
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CLERK

(2)

No. 87-2098

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal From The United States District Court For The Northern District Of Oklahoma

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MOTION TO AFFIRM

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26

QUESTION PRESENTED

Whether Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-41 (to be codified at 49 U.S.C. § 1682a)—in which Congress has instructed the Secretary of Transportation to raise revenue sufficient to cover all the costs associated with administering the Department of Transportation's pipeline regulatory programs—represents an unconstitutional delegation of the taxing power.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States District Court for the Northern District of Oklahoma were: (1) Mid-America Pipeline Company ("Mid-America"),[1] plaintiff below and appellee herein; and (2) the Secretary of Transportation ("the Secretary"),[2] defendant below and appellant herein. At all times, the Secretary has been represented both by Department of Justice counsel and by counsel from the Department of Transportation ("DOT").

---

[1] Appellee Mid-America Pipeline Company is a wholly owned, second-tier subsidiary of MAPCO Inc. Neither Mid-America Pipeline Company nor MAPCO Inc. have affiliate or subsidiary companies (other than wholly owned subsidiaries). This statement is furnished pursuant to Rule 28.1 of the Supreme Court Rules.

[2] At the time this lawsuit was initiated, and throughout the district court proceedings below, Elizabeth H. Dole was Secretary of Transportation. Accordingly, she was the named representative defendant in the district court. Subsequently, Ms. Dole resigned as Secretary and was replaced by James H. Burnley IV, the named representative appellant in this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF FACTS	2
ARGUMENT	5
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) ... 8, 18
Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), *aff'd*, 831 F.2d 1043 (Fed. Cir. 1987) ... 9
Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979) ... 9
Brock v. WMATA, 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987) ... 16
Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985) ... 9
City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) ... 9
Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974) ... *passim*
Florida Power & Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988) ... 10
Head Money Cases, 112 U.S. 580 (1884) ... 15
J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) ... 8, 16, 18, 19
Massachusetts v. United States, 435 U.S. 444 (1978) ... 14, 16
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ... 12
Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) ... 9
National Ass'n of Broadcasters v. Federal Communications Comm'n, 554 F.2d 1118 (D.C. Cir. 1976) ... 9
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) ... *passim*
Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) ... 9
New England Power Co. v. U.S. Nuclear Regulatory Comm'n, 683 F.2d 12 (1st Cir. 1982) ... 9
Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928) ... 12
Rodgers v. United States, 138 F.2d 992 (6th Cir. (1943) ... 15

TABLE OF AUTHORITIES—Continued

Page

Sohio Transportation Co. v. United States, 766 F.2d 499 (Fed. Cir. 1985) 8, 9
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 19
United States v. Menasche, 348 U.S. 528 (1955) 8
United States v. Stangland, 242 F.2d 843 (7th Cir. 1943) 15
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 12

Constitution and Statutes:

U.S. Const.:

Art. I .... *passim*
§ 2 11
§ 7 .... 5, 11
§ 8 11

Airport and Airway Development and Revenue Acts of 1970, Pub. L. No. 91-258, 84 Stat. 219 16
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 .... *passim*

§ 5002 16
§ 7005 .... *passim*
§ 7601 10

Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001 *et seq.* 2
Independent Offices Appropriation Act, 1952, 31 U.S.C. § 9701 .... 6, 7, 8, 9, 10
Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) § 1671 *et seq.* 3
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890 2

Legislative History:

H.R. Rep. No. 300, 99th Cong., 1st Sess. 492 (1985) 17, 19
H.R. Rep. No. 453, 99th Cong., 1st Sess. 440 (1985) 3

TABLE OF AUTHORITIES—Continued

Other Authorities:	Page
51 Fed. Reg. (1986):	
p. 25782	3
p. 46978	4
C. Burdick, *The Law of the American Constitution: Its Origins and Development* (1922)	11
5 J. Elliott, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* (2nd ed. 1887)	12
The Federalist No. 10 (Hamilton)	11
The Federalist No. 48 (Madison)	11
J. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307 (1976)	13, 15
J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978)	15
L. Tribe, *American Constitutional Law* (2nd ed. 1988)	13, 14

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal From The United States District Court For The Northern District Of Oklahoma

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MOTION TO AFFIRM

Appellee Mid-America Pipeline Company hereby moves the Court to affirm the judgment of the district court that Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 100 Stat. 82, 140, is an unconstitutional delegation of Congress' power to tax. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974)—when read against the text and history of Article I of the Constitution—mandate the conclusion that Congress may not delegate the taxing power to an administrative agency in the manner attempted in

Section 7005 of COBRA. For this reason, the judgment below should be affirmed.

Mid-America acknowledges that the question presented by this case is substantial in the jurisdictional sense. As the Government correctly notes, although Section 7005 of COBRA may have been the first occasion on which Congress sought to transfer revenue-raising (taxing) authority to an administrative agency, it has not been the last: the Legislature has recently employed at least one similar legislative device with respect to the Federal Energy Regulatory Commission.[1] The precise constitutional limits of this doubtful practice of assigning to agencies the responsibility of making the difficult tax policy choices that have historically been made only by Congress is a question upon which this Court should pass.

COUNTERSTATEMENT OF FACTS

1. Section 7005 of COBRA, signed into law on April 7, 1986, authorizes the Department of Transportation to raise revenue from companies within its jurisdiction for the purpose of financing the Department's entire pipeline regulatory program. Specifically, Section 7005 authorizes the Secretary to establish a "fee schedule" by calculating and imposing annual assessments on oil pipelines sufficient to cover all costs associated with DOT's pipeline programs.[2] In Section 7005, however, Congress has

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[1] *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-91 (granting the Federal Energy Regulatory Commission the power to assess "annual charges" to recover the entire costs of its regulatory activities). Mid-America's constitutional challenge to this statute is currently pending in Oklahoma federal district court, *Mid-America Pipeline Co. v. FERC*, No. 87-C-571B (N.D. Okla.).

[2] The regulatory programs in question are the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001

neither set the level of these charges itself nor suggested a formula pursuant to which the Secretary is to set the charges. Rather, the Secretary is directed to devise a schedule of assessments, "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1). These *taxes*—which is what they clearly are under the criteria of *National Cable, supra*—are to be imposed against all persons operating pipeline facilities subject to either of the two pipeline programs.

2. The costs which Section 7005 assessments are designed to recoup encompass *all* costs associated with these federal pipeline programs. H. R. Rep. No. 453, 99th Cong., 1st Sess. 440 (1985). They include management, overhead and administrative costs; the costs of funding a grants-in-aid program to the States; the costs of collecting the charges themselves; the costs of bringing civil and criminal prosecutions against pipeline companies; as well as a range of other costs that also bear no connection with any benefits or service that the Department confers on pipelines.

3. DOT published a notice in the *Federal Register* on July 16, 1986, announcing that it had determined that Section 7005 charges would be assessed against individual pipelines on the basis of total pipeline miles, and that an assessment of $6.41 per pipeline mile would reimburse DOT for its costs of regulation for fiscal year 1986. 51 Fed. Reg. 25782 (1986). Although DOT subsequently acknowledged that "there are good arguments in favor of using volume-miles rather than mileage as an assessment basis," it nevertheless chose total mileage as the basis

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et seq., and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) § 1671 *et seq.* These programs establish a regime of regulatory standards which are enforced through a system of inspections; violation of DOT regulations may subject a pipeline to a range of civil and criminal prosecutions and penalties.

for its assessments primarily because it was "simple to administer." 51 Fed. Reg. 46978 (1986).

4. Mid-America Pipeline Company is a Tulsa-based company whose pipelines transport liquids subject to regulation under the Hazardous Pipeline Safety Act. Mid-America, like the other pipelines regulated by DOT pursuant to these regulatory programs, is not dependent in any way on the agency for permission to operate. Nor has Mid-America ever requested any service from DOT in exchange for which Section 7005 charges have been exacted.

5. On July 28, 1986, DOT issued a notice of assessment to Mid-America demanding payment of $53,023.52. Mid-America paid that sum under protest. This action was filed in the United States District Court for the Northern District of Oklahoma on September 4, 1986. Mid-America and the Government filed cross-motions for summary judgment.

6. The district court adopted the Findings and Recommendations of the magistrate to whom it had assigned the motions and held Section 7005 to be an unlawful delegation of Congress' power to tax. *See* Appendix to Jurisdictional Statement at 1a-13a.

ARGUMENT

This case presents the question whether, and under what standards, Congress may delegate the taxing power to an Executive Department. The Government argues that congressional delegations of the power to tax are subject to precisely the same deferential standards as are delegations of ordinary legislative power, and thus, that Congress is virtually unconstrained in its ability to delegate taxing authority to the Executive. That view, we suggest, cannot be squared with Article I of the Constitution and the historical practice of Congress in exercising the taxing authority; nor can it be reconciled with the prior decisions of this Court limiting, in light of such constitutional considerations, congressional delegations of revenue-raising power to administrative agencies. *See National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). On the contrary, the Constitution and its history demonstrate that the inherently discretionary and highly political task of levying taxes is a uniquely legislative function that Congress cannot freely assign to the Executive Branch, at least not without narrowly circumscribing the scope of the Executive's exercise of delegated power.

The source of this constitutional limitation may be traced directly to the Framers' concerns that the taxing power be immediately responsive to the political process. For this reason, the Constitution not only assigns the taxing authority to Congress generally, but sets forth a specific *process* by which the Legislature shall channel the exercise of that power. The Constitution entrusts to the House of Representatives—the House of Congress whose members are most directly and most frequently answerable to the electorate—all responsibility to originate the "bills," giving rise to the statutes, that impose taxes on the people. U.S. Const., art. I, § 7, cl. 1. Historically, Congress has been faithful to this obligation

and has not attempted to abdicate the difficult political choices presented by questions of taxation.

Congress' specific delegation of expanded revenue-raising power to the Executive Branch in Section 7005 of COBRA marks a significant, indeed dramatic, departure from this historical practice and these constitutional restraints. Section 7005 assigns to a federal agency the task of raising revenue to support certain of that agency's own regulatory activities. Within certain broad parameters, however, Section 7005 leaves to the Executive agency the basic tax writing decisions as to which taxpayer to tax, and what tax rate to apply to each. As such, Section 7005 is not merely a "fee" statute that directs an Executive Department to perform the limited function of formulating fees that will reflect the cost of providing specific, requested services that might be charged to those requesting the agency's services. Rather, Section 7005 leaves to the Executive the determination of how best to raise sufficient revenue to cover the costs of its regulatory efforts, with no expression of congressional policy to guide the agency in picking, in multiple choice fashion, among various suggested methods in assessing the tax. Recognizing that such a legislative device is both unprecedented and contrary to this Court's previous decisions, the lower court declared Section 7005 invalid. That judgment should be affirmed.

1. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974), clearly imply constitutional limits on Congress' ability to delegate the taxing power. In these cases, the Court was faced with attempts by the Federal Communications Commission ("FCC") and the Federal Power Commission ("FPC") to recoup the costs of their regulatory activities by imposing assessments against those entities within the agencies' jurisdiction. Relying on the Independent Offices Appropriation Act ("IOAA"), 1952, 31 U.S.C. § 9701—

which purportedly authorized agencies to assess fees that were "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ."—the FCC and FPC developed fee schedules designed to make the agencies economically self-sufficient.[3] These fees were structured so as to charge regulated entities not only for benefits bestowed by the agency on these entities but also for protective services rendered to the public. *See National Cable*, 415 U.S. at 341; *New England Power*, 415 U.S. at 348-49.

In striking down these fee schedules, the Court held in *National Cable* that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." *Id.* at 341. The Court emphasized the vast difference between allowing an agency to set "fees," based on the "value to the recipient" of whatever agency services are performed, and permitting an agency to take into account "public policy or interest served, and other pertinent facts," where one enters into the realm of taxation, historically reserved to Congress.

> The addition of "public policy or interest served, and other pertinent facts," *if read literally*, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

Id. at 341. Because "[t]axation is a legislative function" and "Congress [] is the sole organ for levying taxes," (*id.* at 340), the Court refused to read the IOAA as

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[3] In the case of the FCC in *National Cable*, this was done at *Congress'* direction, but was nevertheless rejected by this Court. *See* 415 U.S. at 339 (quoting H.R. Rep. No. 91-316, pp. 7-8, and H.R. Conf. Rep. No. 91-647, p. 6, where it was stated: "The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.")

bestowing on a federal agency the taxing power. *Id.* at 341.

To be sure, the Court in *National Cable* did not reach the constitutional question whether, or under what standards, Congress may delegate the taxing power. Rather, the Court narrowly construed the IOAA so as to avoid "constitutional problems" and "the hurdles revealed in [*Schechter*[4] and *Hampton*[5]]." *Id.* at 342. Nevertheless, the decision must be read to support the proposition that Congress may not freely delegate the taxing authority to the Executive Branch. The Court declined to give effect to seemingly unambiguous statutory language, effectively reading that language out of the statute, expressly on the grounds of constitutional concerns. Such a drastic interpretative measure was required, presumably, only in the face of a significant constitutional obstacle. *Cf. United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute . . . .' ").

National Cable and *New England Power* have been consistently applied by the federal appellate courts as a constitutional limitation on the exercise of the taxing authority by the Executive.[6] *See Sohio Transportation Co. v.*

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[4] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation). By specifically citing *Schechter* and refusing to rule out its applicability, the Court expressly acknowledged the continuing viability of the nondelegation doctrine as applied at least in the tax area.

[5] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding statute giving the Executive authority to adjust tariffs previously established by Congress in light of changing circumstances on the ground that Congress had set forth a sufficiently "intelligible principle" to guide the President).

[6] The federal courts have applied the constitutional standard implicit in *National Cable's* interpretation of the IOAA to other acts purporting to delegate revenue-raising power to administrative

United States, 766 F.2d 499, 503 (Fed. Cir. 1985) (*National Cable* is premised on the recognition that it would be "an unconstitutional delegation of Congress' exclusive power to tax" for agencies to be allowed to impose charges to recover expenditures for the public interest); *Central & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies are prohibited from assessing fees in order to recover the full costs of regulation because such charges are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *National Ass'n of Broadcasters v. Federal Communications Comm'n*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) (*National Cable*, "as part of the basis for its opinion, relied on Art. I, § 1 and § 8, par. 18 of the Constitution in holding that taxation is an essential legislative function that Congress cannot 'abdicate or transfer to others.'"); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied by Congress"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 227 (5th Cir. 1979) (*National Cable* construed the IOAA narrowly so as not to "offend the constitutional mandate that only Congress has the 'Power to levy and collect Taxes'"), *cert. denied*, 444 U.S. 1102 (1980); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983)

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agencies. *See Sohio Transportation Co. v. United States*, 766 F.2d 499, 502-04 (Fed. Cir. 1985) (applying *National Cable* to a revenue-raising delegation in the Mineral Leasing Act); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable* to a revenue-raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus*, 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable* to a revenue-raising delegation in the Federal Water Power Act), *cert. denied*, 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States*, 9 Cl. Ct. 723, 738-39 (1986) (same), *aff'd*, 831 F.2d 1043 (Fed. Cir. 1987).

("The Court said that assessing industry members for the costs of oversight over the entire industry would require the members to pay 'not only for benefits they received but for the protective services rendered the public by the Commission' in its regulatory role, and suggested that such an assessment might be an unconstitutional tax"). *But see Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).[7]

2. The Constitution assigns the power to levy taxes solely to Congress for reasons that are readily apparent from our revolutionary heritage and that were voiced frequently during the debates that culminated in the drafting of the Constitution. The Framers' concerns that taxation be directly and immediately responsive to the political process and to the popular will are embedded in the constitutional text, which not only assigns the taxing power to the Legislative Branch generally, but sets forth a specific *process* by which the Legislature shall channel the exercise of that power. The taxing

[7] The Government seriously overstates matters when it contends that the district court's decision here is in conflict with *Florida Power & Light*. The delegation at issue in that case—Congress' instruction to the Nuclear Regulatory Commission ("NRC") to recover 33% of the costs of nuclear power plant licensing and inspection programs through a system of fees (*see* COBRA § 7601(a), 100 Stat. 146-47)—was far narrower and much more akin to a traditional fee than that involved here. Much as this Court prescribed in *National Cable*, the delegation in Section 7601 was constrained by two specific statutory directions absent here: annual charges had to be (1) "reasonably related to the regulatory service provided by the Commission" and (2) "fairly reflect the cost to the Commission of providing such service." 846 F.2d at 775. In addition, Congress directed the NRC only to recover a third, not all, of its regulatory costs. These factors are crucial because the thirty-three percent of its budget that the NRC could recover under Section 7601 was related—in the view of *Congress*—to the services that the agency provided the industry. The agency's levy, therefore, was an approximation of the cost of services rendered in a manner closely akin to determinations involved in applying the IOAA.

power, first among the enumerated powers of the National Government, is expressly placed in the hands of the Legislature: "[t]he Congress shall have Power to lay and collect Taxes. . . ." U.S. Const., art. I, § 8, cl. 1. No similar or overlapping power is granted to the Executive. The Constitution requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . .," (*id.*, art. I, § 7, cl. 1), the House where the number of representatives is proportionate to the number of taxpayers in each state, (*see id.*, art. I, § 2, cls. 1, 3), and whose members are all elected for two-year terms, making them immediately accountable to the political process and their constituents. *See id.*, art. I, § 2, cl. 1. Thus, the Framers intended that questions of taxation be (1) part of the legislative process, to be addressed through statutes, and (2) that legislators, notably those in the House, be immediately accountable for the taxing decisions they made in initiating a revenue-raising provision. At a minimum, to permit taxation by an administrative agency would be to render nugatory the textual requirement that revenue be raised by *bills* (not by agency rules) and that those bills originate in the *House of Representatives* (not in an informal rulemaking proceeding).

These constitutional requirements reflect, of course, the concern of the Framers that, of the legislative powers, the power to tax is peculiarly susceptible to abuse.[8] The historical record is replete with references to the inherent dangerousness of the taxing power and for the need to keep it in the hands of a representative body.[9] Accord-

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[8] Indeed, the subject of how to constrain the exercise of this power was one of the most sharply debated controversies raised at the Constitutional Convention. *See* C. Burdick, *The Law of the American Constitution: Its Origins and Development* 155 (1922).

[9] *See, e.g., The Federalist No. 10* (Hamilton) ("there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice"); *The Federalist No. 48* (Madison) ("The legislative department

ingly, this Court has long acknowledged that the mechanism for curbing abuse of the taxing power lies in maintaining a proper separation of powers. As Chief Justice Marshall observed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> The only security against the abuse of this power is found *in the structure of government itself*. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

Id. at 428 (emphasis added).[10]

For these reasons, among others, the Government's assertion (Jurisdictional Statement at 10-11) that there is no basis in the Constitution's text or in this Court's decisions for prohibiting delegations of the taxing power, or at least holding them to a higher standard of scrutiny, is plainly incorrect.[11]

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alone has access to the pockets of the people"); 5 J. Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* 284 (2nd ed. 1887) (statement of Benjamin Franklin) ("[I]t was always of importance that the people know who had disposed of their money, and how it had been disposed of . . . .").

[10] Later in the opinion, Chief Justice Marshall echoed the Framers' concerns when he observed that "the power to tax involves the power to destroy." *Id.* at 431. That comment, of course, was what prompted Justice Holmes' famous reply: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion).

[11] In one of the earliest cases dealing with the issue of delegated authority, the Court suggested that there are some areas which are so central to the legislative function that they may not be delegated: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.). Indeed, certain legislative powers are obviously non-delegable or delegable

3. To permit an Executive Department to exercise the power to tax at the same time it enjoys expansive latitude in connection with the power to spend is to invite the sort of concentration of power that our constitutional structure was designed to avoid. A federal agency that has the authority and discretion to fund its activities by establishing its own program of taxation has little incentive to exercise responsible restraint over its spending or to vindicate its revenue demands before Congress.

4. Taxing decisions involve, in the first instance, highly discretionary distributive issues as to which entity or class of entities is best placed to bear the taxing burden, and on what basis such a burden may be "fairly" allocated. In addition, it has long been recognized that "a tax is a powerful regulatory device" since through it "a legislature can discourage or eliminate a particular ac-

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only under particularly strict standards. *See* L. Tribe, *American Constitutional Law* 362 (2nd ed. 1988) ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility"). Like the taxing power, these other powers that are either non-delegable, or severely limited in delegability, tend to be supported in the Constitution not merely with an assignment of power to Congress but, in addition, a textual description of the mechanics of its exercise.

Consider, for example, the power of Congress to impeach and convict a President for "Treason, Bribery, or other High Crimes and Misdemeanors." U.S. Const., art. II, § 4. As Dean Freedman explains:

> The Framers regarded the institution of impeachment as preeminently a political process, likely to agitate the passions of the whole community. It was, as Hamilton wrote in *The Federalist*, "a method of NATIONAL INQUEST into the conduct of public men," best assigned to "the representatives of the nation themselves."

J. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-27 (1976) (citations omitted). As discussed briefly below, many of these same considerations of institutional competence argue in favor of according the taxing power qualitatively different treatment under the delegation doctrine.

tivity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise." *Massachusetts v. United States*, 435 U.S. 444, 455-56 (1978). Taxing determinations are both highly political and inherently discretionary, and hence not susceptible to ordinary methods of judicial review. For this reason, the power to tax has historically been regarded as non-delegable within our constitutional scheme:

> The same discretionary character of taxation that ordinarily shields it from effective judicial review would also make legislative oversight of a delegate difficult. Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress.

L. Tribe, *American Constitutional Law* 366 n.15 (2nd ed. 1988) (citing *National Cable*).

Thus, it is not surprising that the Constitution vests the Legislature with the obligation of exercising the taxing power because the Legislature is the national institution that takes its character most directly from the *political responsiveness* of its members. Congress is, in short, accountable through the political process for its tax policy choices in a way that agency officials are not. As Dean Freedman elaborates in his assessment of *National Cable*:

> Because no other institution of the federal government except Congress possesses the unique characteristics that the Framers relied upon to provide citizens with an institutional security against unfair or oppressive taxation, no mere delegate of Congress could aspire to exercise the power to tax in a manner qualitatively similar to Congress. The Court in *National Cable Television Association*, familiar with the Framers' design, may have been suggesting, therefore, that considerations of institutional competence would prevent Congress from constitutionally delegating the power to impose taxes to anyone and at all.

J. Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326 (1976). *See also* J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 88 (1978).

5. With Section 7005 of COBRA Congress has authorized DOT to make the decisions respecting taxes—who is to be taxed and at what rate—that the constitutional text confers upon Congress. Whether the Constitution requires that the taxing power be wholly and exclusively exercised by Congress or merely that Congress delineate with particularity the basis upon which the agency shall exercise its delegated authority is unnecessary to decide here. Under either view, this delegation is invalid.

a. Initially, it needs to be emphasized what Section 7005 is *not*. It is not, as the Government apparently concedes, a statute in which Congress has delegated to an agency traditional fee-setting authority, whereby the agency is authorized to impose fees which the agency is assigned the task of correlating with the costs it incurs in providing specific benefits to entities that request its services.[12] *Cf. National Cable, supra; New England*

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[12] The Government does not contest that Section 7005 assessments do not meet the definition of a "fee" as set forth in *National Cable*. Rather, the Government invites the Court to harken back to the *Head Money Cases*, 112 U.S. 580 (1884), in order to reach the conclusion that what is at issue here are fees. *See* Jurisdictional Statement at 13-14. The relevance of these cases to the issue presented by this appeal is, at the very least, attenuated. Their focus is the problem of differentiating between congressional action taken pursuant to the Commerce Clause and congressional exercises of the Taxing Power. The cases and their progeny hold that Congress need not comply with the requirements of the Constitution pertaining to taxation, (art. I, §§ 7 and 8), every time it seeks to impose penalties or assessments as an incident to regulation of commerce. *See, e.g., United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943).

Assuming the relevance of the standard set forth in these cases, however, they only confirm that Section 7005 assessments are taxes. The test set forth in this line of cases for distinguishing between

Power, *supra*. Mid-America has requested no service from DOT in exchange for which Section 7005 assessments are being charged.[13] The entities that DOT regulates pursuant to its pipeline regulatory programs are not dependent in any way on the agency for permission to operate or conduct their businesses. Rather, Section 7005 assessments have been involuntarily imposed on Mid-America, and other pipelines, irrespective of whether the pipelines have sought to avail themselves of any service, filed any papers, or submitted any applications to DOT.

Section 7005 is also not in the mold of a revenue-raising statute in which *Congress* itself sets the tax,[14] fee,[15] or duty,[16] subject only to later adjustment by a

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exercises of the commerce and taxing power is whether the primary purpose of the statute involved is to regulate or to raise revenue. *See, e.g., Brock v. WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987). Section 7005's express and exclusive purpose is to raise revenue, and the point of imposing these assessments is not a regulatory one (for example, to encourage or discourage certain forms of economic activity) but strictly fiscal.

[13] This was perhaps the central defining characteristic of a "fee" as defined by the Court in *National Cable*:

> A fee is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

415 U.S. at 341.

[14] *Cf., e.g., Massachusetts v. United States*, 435 U.S. 444 (1978) (the Airport and Airway Revenue Act of 1972).

[15] *Cf., e.g.,* COBRA §§ 5002(e), (f), 100 Stat. 118-21 (establishing a statutory Schedule of Charges for implementation by the FCC).

[16] *Cf., e.g., J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), discussed *infra* at 18-19.

delegate in light of changing circumstances and according to specific guidelines or preconditions delineated by Congress.

b. By contrast, Section 7005 authorizes the agency to (1) fund itself so as to become economically self-sustaining in administering its pipeline regulatory programs and (2) to accomplish this by determining on its own the most appropriate basis on which to assess the industry it regulates. In the House Report accompanying the Act, Congress acknowledged the considerable latitude given DOT in selecting a taxing formula:

> Because the costs of administering DOT's program are shared by the entire pipeline industry, *some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary.*
>
> *This subsection specifies that the formula must be "reasonable," and gives the Secretary discretion to select among several different approaches for allocating total costs fairly among the various pipelines.*

H.R. Rep. No. 300, 99th Cong. 1st Sess. 497 (1985) (emphasis added).

As the foregoing legislative history makes clear, the criteria offered to the Secretary in the statute—"volume-miles, miles, revenues, or an appropriate combination thereof"—do little to contain his discretion. Indeed, these factors are merely representative of the traditional bases upon which Congress taxes: property and income. *See National Cable*, 415 U.S. at 340. To instruct the Secretary to devise some "reasonable" formula [17] based upon any "appropriate" combination of these factors simply

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[17] The direction that a tax formula be reasonable is no direction at all. One would assume the Secretary would know he was required to be reasonable without being so told.

does not confine the delegate's range of discretion in any significant respect.[18]

6. For two reasons, the Court's decision in *J. W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), does not "foreclose," as the Government insists, the principle that the taxing power "is treated differently from other powers when deciding whether a statute represents an unconstitutional delegation." Jurisdictional Statement at 11. First, the Court in *National Cable* reserved the possibility that either *Hampton* or the more rigorous requirements of *Schechter* might guide constitutional resolution of the delegation question. Thus, the Court expressly left open the possibility that the appropriate analysis in evaluating delegations of taxing authority should involve the more demanding standards applied in *Schechter*.

Second, the district court was in any event correct in its construction of *Hampton*. The statute at issue in *Hampton*—Section 315 of Title III of the Tariff Act of September 21, 1922—aptly illustrates the distinction between delegating the taxing power (i.e., as a legislative function), on the one hand, and responsibility for administering a Congressionally-made assessment program, on the other. In the Tariff Act, Congress itself initially set specific duties to be imposed on various categories of imported merchandise. What was delegated to the President in Section 315 was the task of adjusting these duties

[18] The chart accompanying Magistrate Wagner's Findings and Recommendations is illustrative of this range of discretion. *See* Appendix to Jurisdictional Statement at 12a-13a. The Government is, incidentally, incorrect in asserting that this chart is from "an exhibit used by appellee that had in fact been ruled inadmissible." Jurisdictional Statement at 6 n.4. Although Mid-America did utilize a similar chart which was ruled inadmissible, this one was in fact prepared by the Magistrate using data from official federal reports (FERC Form 6). In any event, the Government's apparent evidentiary objection to reliance on these figures is misdirected since the chart is merely intended to be exemplary of the discretion afforded DOT under Section 7005. Whether the figures used are actual or hypothetical is beside the point.

in light of changing circumstances so as to maintain and equalize the differences that arose between the costs of producing at home and in foreign countries the types of goods and articles to which such duties applied, thus effectuating standards that Congress had established with clarity.[19] By contrast, in Section 7005, Congress has itself made no specific taxing determinations at all other than to say that "some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

CONCLUSION

The judgment of the district court should be affirmed, or in light of the fact that the federal question presented here is substantial in the jurisdictional sense, the Court should note probable jurisdiction.

Respectfully submitted,

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July 27, 1988

[19] In fact, *Hampton* did not involve taxation *per se* but rather the regulation of *foreign commerce*, and thus the Executive Branch's independent but overlapping authority over matters of foreign policy. The Court has long upheld the legitimacy of what otherwise might be overly broad delegations of congressional power to executive officials in the special context of joint congressional-executive exercise of foreign affairs powers. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

No. 87-2098

(10)

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED OCTOBER 3, 1988

58 pp

INDEX

	Page
Relevant docket entries of the district court	1
3/25/87 Transcript of oral argument on cross-motions for summary judgment	3
DOT Rulemaking Publications:	
51 Fed. Reg. 25782-84 (July 16, 1986)	34
51 Fed. Reg. 46975-78 (December 29, 1986) ..	42
Order of the Supreme Court noting probable jurisdiction	56

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1986		
9-4	1	COMPLAINT.
10-21	4	MOTION of pltf for S/J.
10-21	5	MEMORANDUM in support of #4.
10-21	6	APPENDIX of additional materials in support of #4.
11-17	9	ANSWER of deft.
1987		
1-5	11	CROSS-Motion of deft for S/J.
1-5	12	MEMORANDUM in support of #11.
1-8	MO	ORDER that case is referred to Mag for hrng on x/mots for S/J. (JOE-J) c/Mag
2-4	14	OPPOSITION of pltf to DOT's x/mot for S/J.
2-23	17	REPLY of deft in support of mot/S/J.
2-27	18	MOTION of deft to vacate order referring case to Mag.
2-27	19	MEMORANDUM in support of #18.
3-5	20	RESPONSE of pltf to deft's mot/vacate order referring case to Mag.
3-23	21	ORDER that deft's mot/vacate referral to Mag is denied. (JOE-J)
4-22	–	TRANSCRIPT of hrg. on cross mots/sj held 3-25-87 before Mag.; pp. 1-40;
5-8	23	NOTICE of pltf of additional authority.

DATE	NR.	PROCEEDINGS
5-11	24	RESPONSE of pltf to deft's notice of additional authority.
8-5	25	Findings and Recommendations of Mag. (JLW-Mag)
8-19	26	OBJECTION of deft to F/R of Mag.
8-19	27	SUPPLEMENTAL memorandum in support of #26.
8-28	30	ADDITIONAL filing of deft's in support of deft's obj. to recommendation of Mag.
9-9	31	MEMORANDUM of pltf in support of Mag's R/R.
9-24	32	REPLY of deft in support of objections to F/R of Mag.
12-30	33	ORDER affirming the Findings and Recommendations of Mag. (JOE-J) c/m
1988		
1-21	36	NOTICE OF APPEAL by Deft. from the O. of 12-30-87 to the *Sup. Ct.*
2-5	40	MOTION of pltf for entry of judgment. (J to J)
2-9	41	JUDGMENT for declratory & injunctive relief ENTERED for pltf & against deft. (JOE-J) (EOD 2-10-88)
3-9	45	NOTICE OF APPEAL by Deft. from the judg. of 2-9-88 to the *Sup. Ct.*
5-20	47	ORDER that judgment of declaratory & injunctive relief of 2-9-88 is stayed pending appeal to the US Supreme Ct. (JOE-J) c/m
7-1	–	NOTICE of appeal filed @ Supreme Ct. on 6-23-88.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 86-C-815-E

MID-AMERICA PIPELINE COMPANY, PLAINTIFF

vs.

ELIZABETH H. DOLE, DEFENDANT

TRANSCRIPT OF HEARING ON CROSS MOTIONS FOR SUMMARY JUDGMENT HAD ON MARCH 25, 1987

Before The Honorable JOHN LEO WAGNER, Magistrate

APPEARANCES:

For the Plaintiff:	Mr. Richard McMillan Crowell & Moring
For the Defendant:	Mr. Jim Gardner Department of Justice
Also Present:	Ms. Barbara Betshuk Department of Transportation

ELDON R. SIMPSON
United States Court Reporter

PROCEEDINGS

[2] COURT CLERK: Case Number 86-C-815-E, Mid-America Pipeline Company versus Elizabeth H. Dole. Would counsel please enter their appearance into the record?)

MR. MCMILLAN: Richard McMillan, Your Honor, with Crowell and Moring, here representing the plaintiff.

MR. GARDNER: Jim Gardner with the Justice Department in Washington for the defendant, and with me is Barbara Betshuk with the Department of Transportation.

THE COURT: How do you spell your name, please?

MS. BETSHUK: B-E-T-S-H-U-K.

THE COURT: All right. Mr. McMillan, you fired the first shot here on your—

MR. MCMILLAN: —first shot here. Your Honor, we're here to determine, as you know, whether or not the Constitution imposes a limitation on Congress's power to delegate the taxing authority. It's an issue of separation of powers. It's an issue of separation of two principal powers; the power to spend on the one hand, which has always been a function of the executive agency of government, and a power to raise revenue, on the other, which has always been a function for Congress. And to us, that's very much a function of principle. That's why we're here, and I'll be candid in telling you—if you haven't figured it out already—that it's not the size of this particular tax that's troubled us. [3] And in fact, to be honest about it, the reason we're here is—the gentleman on my right, Mr. Fred Isaacs, is the president of Mid-America Pipeline—-just doesn't like the way that this thing has kind of been handled. He thinks you ought to call a spade and spade, and if it's a tax, you ought to call it a tax, and if it's a tax, it ought to be Congress that assesses it and not an admini-

strative agency like the Department of Transportation that doesn't have any specialization or any particular expertise at all in that area.

So we're here to talk about principles, constitutional principles, and I'll do my best to be as candid with Your Honor as I can and to answer whatever questions you have, because I'd like to see—I think we'd all like to see this case resolved on the basis of an honest look at the constitutional principles and make sure that we get to the right bottom line the right way.

I'm going to talk about three basic issues. The first is what is a fee. I think Your Honor has probably read about that at some length in our briefs. I don't think, at least I hope there won't be much dispute about that, and I don't expect to spend a lot of time on it, but I will certainly respond to any questions you've got on that issue.

The second issue is did the Supreme Court really mean to hold that the taxing power can't be delegated in the same [4] way that every other garden variety legislative power can be delegated. And I won't spend a whole lot of time on that issue, too. I will go through some of the cases, and I think we'll come out on that issue with a rather clear understanding from the cases and commentators that indeed that's precisely what the holding was, which gets me to the third issue which I think is the real issue, and it's the difficult issue you're going to have to decide.

And that is, given that there is a constitutional limitation, if you find that, what is—what is the nature of the constitutional limitation on the delegation of taxing power and has it been violated here? And I'll try and devote the bulk of my argument to that latter point.

Before I do, though, let me, as I say, briefly address the first two issues, and let me begin with the fee/tax distinction.

THE COURT: Let me say, I've read the briefs—

MR. MCMILLAN: Okay.

THE COURT: —and I've read if not all, at least a majority of the cases cited in the briefs at this point. And I'm fairly well that under these circumstances what we're dealing with here is a tax and not a fee. I'm really at this point in my analyisis grappling more with your third area of inquiry than I am the remainder of it. I think there is a limitation on the delegation—on the power of Congress to [5] delegate the taxing power. I think this was in fact a tax.

What I'm grappling with at this point, after a review of your briefs, is whether or not under these circumstances the delegation exceeded the limits that ought to be properly imposed. In other words, there's no doubt that the Congress established this tax. This is not something that was initiated through the rulemaking authority of the agency itself. This statute is a statutory matter enacted by Congress, and certainly the collection of the tax was delegated to the Department of Energy. Now, to the extent that that delegation went beyond the collection of the tax to those issues that I think both sides have identified, who is to be taxed, how much is to be taxed, when they are to be taxed, does that—do those types of decisions constitute a constitutional infringement? That's where I'm focused at this point.

MR. MCMILLAN: That's where I'm focused, too. I think we're in agreement on what the right issues and the wrong issues are. Let me, I guess then, just pass over the fee/tax distinction. I think we have covered that in our briefs, and I would like to respond if the government raises something surprising in their argument, but let's move to the second issue of the three I mentioned, because I think dealing with the second issue helps to illuminate the third issue in a way that hopefuly will be helpful.

[6] The government has suggested that National Cable does not really stand for the proposition that there is any constitutional limitation, other than kind of normal delegation doctrine limitations on the power of the Congress to delegate the taxing authority, and I think that that is demonstrably incorrect for basically three reasons.

The first reason is that National Cable rewrote a statute. That's as kind of straightforeward as I can put that proposition. And to understand it, it's useful to kind of think about the standards for statutory construction that would otherwise have governed this proceeding. Standards like you're bound by the statutory language first and foremost, and ought to do your best not to do violence to that language, and if there is a question about it, you ought to consult the legislative history and the intent of Congress. And third, you certainly shouldn't read out of the statute relevant portions of it.

But in this particular case, there is specific language in the statute to the effect that the agencies should take into account, quote, "public policy or interests served and other pertinent facts," which the Supreme Court not indirectly but quite explicitly read out of the statute, and they could only read that out of the statute if it was predicated on a constitutional proposition. And so the holding of the case demands that we find that there was a [7] constitutional requirement that certain facets of that statute be changed.

And point two is that's specifically what the Supreme Court says it's doing. It says there are constitutional problems here. It says we're going to revise the statute because of the constitutional problems, not because of some rule of statutory construction or anything of the sort.

So we know from looking at the holding and the language of National Cable that there is a specific limitation. We also know that the Supreme Court doesn't spell

out in every respect exactly what that limitation is, and that's the third point we're going to get to in a minute. But before we do, it's useful to look at how the other courts around the country have reacted to National Cable, what sort of interpretation have they put on the issue of what limitation is imposed by the Constitution as that case demands, and I thought I would just direct the Court – the Magistrate's attention specifically to the three brief quotes, which I think I – if Your Honor wouldn't mind, I'll just read. Each is about a sentence long.

The first is from the Phillips Petroleum case, which is a recent Tenth Circuit case, at 86 F. 2d 370, and I'm reading from page 375, which states, quote, "In National Cable Television Association versus FCC, the Supreme Court reviewed the IOAA and determined that agencies had authority to charge [8] fees to recipients of quote, 'special benefit', but that agencies could not tax such recipients". That's a statement by the Tenth Circuit of what they thought National Cable was holding.

And if we go to the D.C. Circuit, if I can quote from National Association of Broadcasters versus FCC, and now I'm at 554 F.2d at page 1129, the D.C. Circuit has the following to say: "In this connection it should also be noted that National Cable, as part of the basis for its opinion, relied on Article One, Section One of Section Eight, Paragraph Eighteen of the Constitution, in holding that taxation is an essential legislative function that Congress cannot abdicate or transfer to others. Once agency charges exceed their reasonable attributable costs" – which is a term they're using in terms of – does it relate to a specific benefit that's being received by the specific recipient – "Once agency charges exceed their reasonable attributable cost, they cease being fees and become taxes levied not by Congress but by an agency. This the cases hold is pro-

hibited." So that's a second recent illustration of how the courts have interpreted National Cable, and I will just try one more, and there are others—

COURT CLERK: Mr. McMillan, excuse me.

MR. MCMILLAN: Yes.

COURT CLERK: If you'll wait a moment, I need to [9] change tapes.

MR. MCMILLAN: Sure.

(Tape changed)

MR. MCMILLAN: All right. The third case I'd like to quote from, Your Honor, is the Fifth Circuit decision in Mississippi Power and Light, and I'm quoting from 601 F. 2d at page 227, quote, "Broadly construed, the IOAA could have been interpreted to permit federal agencies to recoup their entire cost of regulating, a result which would offend the constitutional mandate that only Congress has the"—and then it quotes from the Constitution, " 'power to levy and collect taxes' ".

So, if we ask ourselves the question does National Cable specifically impose a constitutional limitation on the power of Congress to delegate the taxing authority and had the court so interpreted National Cable that way, I don't think there is any question but that the answer to that is yes.

And that brings us to the issue which is at the heart of this case, which is, what is the nature of that limitation.

And there are basically three possibilities that Your Honor will have to choose among and perhaps variations, but I think that these are the basic three.

The first is a finding as some of the courts I've just quoted have suggested, that the taxing power is special and should not be delegated at all to allow specialized [10] agencies to be—

The second possibility is that the taxing power is special, that it can nevertheless within meaningful restraints be

delegated, but that that delegation should never reach the fundamental issues of who's going to be taxed and how much they're going to be taxed.

The third possibility is one Your Honor would have to make up and would have to do with some lesser degree of restraint on the delegation power. I'm not sure what that would be. We've suggested to Your Honor that if you start drawing the line in kind of a fuzzy way that says, "Congress, you can delegate the taxing power, but please be careful about it", and that's all, that you're going to have a lot of delegation of this fundamental power in a way that we find objectionable.

And so with that in mind, let me go back through these three possibilities, and let's talk about which of them make the most sense. And I'll be candid with Your Honor and say right now that I think the first one makes the most sense. We'd like to see a bright line drawn. We don't see a reason why Congress needs to delegate to an agency like the DOT, before I—

THE COURT: If you draw the bright line at that stage, and here I'm calling to mind the argument put forth by the government regarding the IRS. Certainly the IRS is a [11] branch of the executive portion of government, and they certainly formulate regulations and—that have some determination as to who will be taxed, and, in connection with that, how much they will be taxed with regard to income taxation. Were we to adopt your bright line in this first category you've outlined, how do we accommodate the rather vast body of law that has put its stamp of approval on the delegation to the IRS?

MR. MCMILLAN: Well, let's be careful when we say on the delegation to the IRS. One thing that isn't in dispute here is the notion that, as Your Honor suggested at the outset, someone can be charged with the collection function and certain administrative functions. That's not dele-

gating the power to make taxes. That's delegating kind of a collection function which the IRS clearly performs and which we would have no problem with the DOT performing for that matter. That doesn't entirely answer your question, but I think it's fair to say that – that there probably are the following additional two points that do answer your question.

First of all, the IRS plays an interpretive role in tax policy, and to illustrate the difference between the IRS role and perhaps the DOT role, let me hand up to Your Honor something we prepared this morning, and I've only given it to counsel immediately before the argument, and he has not had a real opportunity to look at this very carefully and for sure [12] if he has problems with it or wants to make some comment about it afterwards, we would have no objection. But what we did is take information we had available for some pipelines – and we only had information available for a few, and so this is in a sense an arbitrary selection of a few pipelines for which we had information available. And we assumed that there would be a total tax collected of a thousand dollars. And then on the basis of that assumption we calculated what the tax on each of these companies would be, assuming that DOT selected tax based on miles, which is one of the options they have, or a tax based on volume miles or barrel miles, which is the second option they have, or a tax based on gross revenue, which is the third option they have, and they are given a fourth option of, quote, "some combination of the foregoing".

As Your Honor can see, we're not talking about minimal intepretive functions with respect to how much this company or that company is going to be taxed. We're talking about a situation where if you look at Mid-America and Colonial, which are the two – the second and third

pipelines here, if you chose a tax based on miles, Mid-America's percentage of the total is twenty-eight percent, and Colonial's is eighteen percent, two hundred and eighty-three versus one hundred and eighty-four. But if you change the measure to one of the other acceptable standards—and note that DOT has total discretion to decide which is the best—[13] you see that Mid-America's tax goes down to five percent; Colonial's goes up to seventy-one percent. That is a radical swing that is a function of DOT's exercise of discretion. And I don't think that the IRS is asserting those sorts of large determinations about how much people get taxed.

You're talking about an International Revenue Code that's passed by Congress that says very specifically you're going to get—each person is going to get taxed fifteen percent, or twenty-eight percent, or thirty-three percent. You're going to get deductions for moving expenses, for this, that, and the other thing, and at the end of the day your tax is going to be computed in precisely this manner, and it is true that it is a complicated code and that sooner or later, because of the esoterics of all the different taxpayers, you need to get a specialized agency like the IRS into the act to interpret exactly what moving expenses means, to interpret what it means in the context of a particular fact pattern.

But we're not talking about interpretation here. There's no issue as to what volume miles means or miles means. We're talking about a fundamental decision about how much Mid-America should be taxed versus how much Colonial should be taxed. And that's a fundamental decision that Congress ought to be making, that there's no reason to have DOT make.

The other thing I would say is that I don't think Your Honor should even reach the IRS issue in your opinion.

[14] To me, what we have in National Cable, and the New England Power case, and the series of cases is a very clear statement that when you're talking about nonspecialized DOTs and FCCs, people made up of old railroad men, and old communication men, and this, that, and the other, there is fundamental requirement that the taxing power not be delegated. I think that—that requirement applies to the IRS as well. I don't think the IRS violates it. But I don't know what is in the intricacies of two thousand pages of the IRS Code, and I don't think Your Honor ought to reach that issue at this point and start making decisions about what National Cable means to the IRS. I think they are entirely squarable. But I don't think it's an issue which the Supreme Court reached in National Cable, and I don't think it's an issue which Your Honor should reach here.

I guess I've said, via this chart, what I want to say with respect to the second of the two possibilities, that is, if Congress can delegate this power to the DOT, they ought at least not to be permitted to delegate but who's going to be taxed and how much is going to be taxed to an agency like the DOT. They ought to at least not be able to do that. And because they have very clearly gone beyond that, if that's the test, if that's the standard Your Honor avows, it can be delegated, but the limits are, "Congress, you decide and how much and let the agency do some interpretation in other [15] things", then this statute violates that proposition and ought to be thrown out on that basis.

But, as I have said, we are not urging Your Honor to go to that second position. We are fundamentally urging Your Honor to stay with what we've described as a bright line. And I guess I'd like to summarize the reasons why I think that that clear statement, that it makes sense.

Some of the reasons are admittedly kind of technical reasons. They are reasons such as the cases. There are

cases, three of which I just quoted, which say that delegation of the taxing power is prohibited. If you go back to those quotes and others, you will find in the cases statements that National Cable means that, that that's what we ought to hold National Cable to be, that it's prohibited, period.

You will find commentators who reach the same conclusion, both that National Cable says that and that National Cable ought to say that, that the taxing authority is a special function, that it has never been delegated in two hundred years and it ought not to be delegated now. So there are cases and there are—is scholarship that supports the proposition that it shouldn't be delegated at all.

I'm confident that in a few minutes government counsel is going to stand up and say, "Your Honor, there hasn't been a statute struck down in fifty years on the basis of delegability doctrine". And putting aside for a moment, [16] although I'll get back to it, the proposition that that's flatly incorrect, the fact of the matter also is that for two hundred years, Congress never tried to delegate the taxing power. It was always understood, and the understanding was acted upon, that that power wasn't going to be delegated in the first place, so that the notion that the delegation of other powers haven't been struck down is perfectly beside the point when you talk about two hundred years of uninterrupted history, uninterrupted, I should add, until thirteen years ago, where, contrary to the implication of the government's nothing has been struck down in fifty years statement, National Cable was decided. And National Cable specifically says that we're going to strike this down because of constitutional problems, which have to be separation of powers problems. So there just oughtn't to be any question about the proposition that there is responsible and respectable authority out there and scholarship out there for the bright line test.

Having said all of that, this is ultimately one of those unusual cases which is probably not a function of scholarship. We're not talking about a principle that's complicated, or arcane, or is the subject of discussion by professors. We're talking about a subject that every person that you could walk out the door right now and run into has an opinion about. It's just that fundamental. It's a basic [17] notion about whether or not the taxing power in a democracy ought to be delegated to unelected people who would be very difficult to even find within the halls of the Department of Transportation or some other federal bureaucratic agency.

And when you look at the issue from that standpoint, you see that this becomes, even though the DOT safety program is just a little first step, a first example, you see that it becomes kind of a most fundamental issue that any of us could face. It is the issue of whether or not the separation of the spending power and the separation of the taxing power should be preserved. And that in a sense is just about all that the government does, in one sense. They raised money, and they spend money. And as soon as we adopt a rule of law that says the executive departments of government can bring unto themselves not only the power to spend it but to tax for it as well, then there is a fundamental loss of the control, and really the only control we have, over those federal agencies. And without getting too philosophical about it, there is a fundamental thing that Justice Douglas identified as being at the heart of our Constitution, which he didn't think was appropriate.

Let me make one other final point, and then I'll close. I think it's important to recognize exactly what's going on with this particular tax. We are dealing with only one tax here this morning, and on a grand scale it's a [18] relatively modest size. But since we filed our initial brief, a second

agency has adopted user fees, and it's only a matter of time before others do as well.

The reason for that is very simple political reality, which we all read about in the newspapers. We've got a tremendous deficit. We've got a balanced budget act, Graham-Rudman, and we've got an administration and many people in Congress who don't want to raise taxes. And that creates a real dilemma for Congress. It creates real pressure to find the easy way out, just wiggle off here or sneak out of the constitutional requirements there, and they will do it, because that's the way Congress acts, unless somebody puts a stop to it right now.

And so less anybody think that we're dealing with one little program, we're dealing with a proposition that Your Honor is probably going to be the first to decide but which other courts are going to decide sooner or later and which is going to be a fundamental proposition of whether or not when Congress taxes it calls a tax a tax and does it directly or whether it sneaks it in through an agency without competence to assess the taxes in a way that no one knows about and in a way for which Congress can't be held responsible.

We would urge Your Honor to adopt a bright line test and to hold that under National Cable the taxing power shouldn't be delegated, period. Thank you.

[19] THE COURT: All right. Thank you. Mr. Gardner?

MR. GARDNER: Good afternoon, Your Honor. I would like to begin with the issue as he framed it at the start of the hearing and focus on the—Mr. McMillan's third point as to the limits of the delegation doctrine and if they've been exceeded in this case.

Mr. McMillan was absolutely right that I would stand up here and the first thing I'm going to say is that no court in fifty-two years has struck down a statute on the grounds

that it was an improper delegation of congressional authority. And I don't think that's important as an interesting historical fact or that that is in itself a persuasive reason to rule one way or the other. What is important—what's important about it is that it's indicative of something. It's indicative of the fact that it is—the constitutional standards for congressional delegation of authority are very minimal. They're easy to meet. And because they's easy to meet, over—since—not since 1935 has Congress actually stepped over the bounds.

THE COURT: Now, you say delegation of authority. That may very well be the case, but I distinguish between the delegation of authority and the delegation of this taxing power. Certainly, as we all know, there have been a vast amount of delegation of authority to various agencies in terms of rulemaking, and the birth of administrative agencies has [20] been phenomenal. And that's largely because we live in a very complex society, and there's lots of problems, and there's a limit to what Congress can do. And so in order to accommodate the work load, it's necessary to formulate all these different regulations. And all you need to do is look at the CFR to see the type of activity that has been ongoing.

But that—that to my mind is different. There's been addressed here an issue that's been couched in terms of a fundamental constitutional issue involving separation of powers. And rather than get bogged down so much in the delegation of authority—certainly there is valid delegations of authority—let's try and focus on the delegation of this taxing power to an agency.

MR. GARDNER: Fine, fine. In that case, let me frame the question for you like this. What's at issue in this case is the constitutionality of a statute, and that is important, because I think the plaintiff's are trying to paint this as

though the agency has gone off—has gotten a wild hair and has gone off and just started taxing people. That's not true. There is a congressional statute on the books. The statute—the only way the statute can be obeyed is for the Department of Transportation to go out and assess what we're calling here a tax. However, you know from our briefs we think it's a fee. I won't—I will address the issue you'd like to hear about though.

[21] So Congress has directed this, and the question before the court is, assuming that this is a tax, has Congress in enacting this statute, delegated improperly the taxing power. Now, the issue has been framed in two ways for us by the plaintiffs. One, they say the taxing power is simply nondelegable, period.

There is no authority for that, Your Honor. The taxing power is one of dozens of powers that's listed in Article One, Section Eight of the Constitution. Like all those powers, it's subject to the necessary and proper clause which says that Congress can pass all laws necessary and proper to execute its enumerated powers. There is no asterisk in the Constitution after the word "taxes" with a footnote that says by the way, this is the only power here that's nondelegable. So there's nothing in the text of the Constitution or even in the, you know, the structure of it that would indicate that the taxing power should be different. And the Supreme Court has held exactly that. And that is a point I really want to stress.

There is a case directly on point. It's the Hampton case. We've cited it in our brief. In that case, the plaintiffs raised the same argument that's raised here. They said you can't delegate the taxing power. And the Court said that's not the case. The taxing power is like all the other powers. The authorities, the delegation authorities make no [22] distinction, was their language, and they held that it could be delegated. In fact, they gave a number of

reasons why Congress might properly want to delegate it. And those reasons were, for example, if Congress had to sit around and fix every rate on every tax and pull out their calculators and dot every I and T and do all the arithmetic, they would not have time for any other functions. And the Supreme Court recognized that. As we said, the rationales behind the delegation doctrine are practical rationales. Congress can't do everything, especially nowdays with a country of two hundred forty million people, the biggest economy in the history of the world. It's essential for them to be able to delegate certain powers, certain authority, and –

THE COURT: Let me ask you this, because I think your argument here makes a lot of sense. Mr. McMillan's main problem with the statute as it reads is that it allows the agency to determine how much different pipelines are going to be taxed by virtue of its determination what the tax will be based on, either miles or pipeline, or barrel miles, I guess the number of mile barrels or the measure of liquids being pumped through pipelines, or in gross revenues, and that this results in various discrepancies.

What Congress did here is it gave the agency really four different choices. So there was a decision to be made here that amounted to choosing choice A, B, C or D. Now, to [23] my mind, that is not the type of decision that results in thousands of subdecisions to be made, the crossing of Ts, the dotting of every I that you refer to. But it's simply a relatively simply [*sic*] multiple choice, you circle the one that you want to be used.

So in that regard, although I think your argument does make a lot of sense, I'm having difficult in applying it to this particular situation.

MR. GARDNER: Okay. Well, let me see if I can help you out. I think it's ironic that the plaintiffs have seized

on the multiple choice aspect of this, as you say, has shown that it's a—that it's an improper delegation. In fact, what it shows is exactly the opposite, that Congress has given an unusual amount of guidance to the agency. The language of the statute itself, Section 7005(A)(1), says, "The Secretary of Transportation shall establish a schedule of fees based on the usage in reasonable —", and then it goes into the multiple choice, in reasonable relationship to the three things, and then, "of natural gas and hazardous liquid pipelines." Now, I would say to you, if all Congress had said is the secretary shall establish a schedule based on the usage and—based on the usage of natural gas and hazardous liquid pipelines, in other words, omit the multiple choice, if they had said that, without specifying any way in which the agency could implement that, that would still be within, well within [24] the scope of permissible delegation under the standards of Hampton and American Power and Light. And I'll get to those in a second and tell you exactly what those standards are.

But the fact that Congress didn't just say to establish a schedule fee—of fees for gas and hazardous liquid pipelines but said also, "and there are only three ways that you can do it. In the entire universe of possible administrative choices, you may only make three, because those are the only three that we deem to acceptably implement our will", and it enumerates them.

Now, the standards in Hampton, in the Hampton case the Court said all that Congress has to do is lay down an intelligible principle. That's it. In the American Power and Light case, which we've also—we've cited both these cases in our—they said essentially the same thing. They've said that Congress—delegation is proper if Congress, number one, identifies the agency that's to implement their will; number two, states the general policy that they want the

agency to pursue; and number three, outlines or defines the boundaries of the delegating authority. That's it. Those are the only requirements as the Supreme Court has stated them.

And here we have far, far more than enough to meet those minimal standards. First of all, this statute, unlike the IOAA, which was at issue in National Cable I might add, this statute names the agency.

[25] All right. We're one third of the way there already, just having done that. Number two, the policy, the purpose of this statute is made abundantly clear. What the agency is to do is to establish fees that are related to pipeline use, and it says, the statute in Section C says—limits, says exactly what the funds can be used for, so there's no question about that. And Section D says exactly that—the absolute ceiling that can be raised, so—

THE COURT: The policy implemented here—

MR. GARDNER: Uh-huh.

THE COURT: —or defined by Congress in the statute, or at least as I divine it to be, is raise enough revenue to pay for your own operations. Isn't that basically what the purpose of this statute was? To have the agency raise enough revenue to cover its own operations, which to my mind is precisely the policy stated in the IOAA. In other words, the policy there was also raise enough revenue—or you're permitted to raise enough revenue to cover your own operations.

The problem I have with that, and the problem frankly I have with this statute, is that in interpreting the IOAA, the Supreme Court specifically said the limitation in the ways that you can raise revenue—first of all, there is a limitation, and that is that you can only do that by way of fee. And the fee is defined as being a special benefit. In [26] other words, you can only raise revenue or make assessments or impose fees, however you want to say it, when

you grant a special benefit—to my mind, that is a, very much a word of art—to the industry or the business, whoever is being forced to pay.

In that case, they—or the cases that have interpreted that for the most part, they have determined that in fact there have been special benefits which have accrued. Some of the cases talk about special benefits in connection with a general public benefit. But it seems to hinge on the agency's ability or execution in defining that special benefit.

Now, what has happened here, appears to me to have happened here, is that with this same sort of mandate, in other words raise revenues to cover your own costs of operation, the agency has imposed these users' fees without identifying any special benefit accruing to those being asked to pay the fees or the taxes. Under the decision of the Supreme Court in National Cable, it appears to me that what that is then is a tax. And I have some difficulty in that context or in that framework of calling it anything else other than a tax and escaping the conclusion that what's happening here is that the agency, with congressional approval no doubt, had stepped across that line to what the Supreme Court has clearly said is impermissible and unconstitutional. I don't [27] think that there's any problem with the agency raising revenue and perhaps even raising revenue that would cover its entire scope of operations, the cost of operations. But doing that without identifying a special benefit accruing to that industry or those companies being asked to pay the revenue seems to me to cross that line. So that's my concern.

MR. GARDNER: I understand your concern, and I think the way to satisfy it is to take a look at the plaintiff's arguments and also at National Cable.

Let me go back to the point I started. Having decided that this is a tax and not a fee doesn't get you anywhere.

Okay. It doesn't get you anywhere, because Congress has the constitutional authority to assess fees, and it has the constitutional authority to tax. The very first sentence—or the first sentence of the second paragraph of plaintiff's opening brief says we concede that Congress has the power to tax. Of course they concede that. There is no question about it. So whether it's a tax or a fee doesn't get them anywere. What gets them someplace is if it's an unconstitutional statute by virtue of an improper delegation.

National Cable did not speak to that, and there is a case that was brought to my attention only yesterday, or I would have cited it in my brief, and I would like to bring it to the court's attention now. It's called Aeronautical Radio, and the citation is 335 F.2d 304, and that is a Seventh [28] Circuit case from 1964 in which the Seventh Circuit considered the issue that the Supreme Court did not decide in National Cable. The issue that the Supreme Court did not decide in National Cable was whether the IOAA was an overly broad delegation of congressional authority. The Seventh Circuit did decide that, and they decided that the IOAA was not an overly broad delegation of congressional authority, despite the fact that it doesn't name what agency should carry out the congressional policies, despite the fact that the policy behind it is extremely vague and the language is cryptic, despite the fact that under the IOAA an agency had the option to impose fees or not.

THE COURT: Now, this is a 1964 case—

MR. GARDNER: Right.

THE COURT: —out of the Seventh Circuit.

MR. GARDNER: Right.

THE COURT: National Cable, of course, was decided in 1974, ten years later.

MR. GARDNER: Absolutely.

THE COURT: And interpreted the same statute. And it seems to me, although National Cable did not – the Court did not come right out and say this is an unconstitutional statute, what they did, in effect, was rewrite the statute so as to make it constitutional, and did so specifically stating we're doing this in order to avoid the constitutional [29] problems. Now, to cite a 1964 case out of the Seventh Circuit and say that that somehow impacts that, I have trouble seeing where you're going.

MR. GARDNER: I'm – I'm – I'm not going to cite that. I'm not citing it to be authoritative at all. Obviously, it's from a different circuit, so you can ignore it if you want. I think the reasoning there is interesting and perhaps persuasive, and that's the only thing that I'm citing it for.

As far as National Cable goes, I think it is incorrect to say that the Supreme Court rewrote the statute. What they did was they looked at what – let me tell you what I think they did in National Cable. They looked at the statute. They said this statute is very vague. This statute seems to give almost unbounded discretion to an agency to impose taxes or do whatever it wants. If we are forced to consider the validity of this statute, we might have to strike it down as an unconstitutional delegation. We don't want to have to do that. Our way out is to construe the statute narrowing, not rewrite it, but to construe the statute narrowly based on our reading of the legislative history.

And if you'll look at the last couple of pages of the National Cable case, what the Court says is, it focuses on a particular piece of the language of the IOAA. That's the piece where the statute says one of the things that agencies [30] should consider is the value to the recipient. And this phrase, value to the recipient, is sort of the genesis of the National Cable opinion. The Court homed in on that, it looked at the legislative history, and it said ah-ha. We can

effectuate the intent of Congress with this statute as written if we recognize that what Congress really meant with this statute was that agencies should charge fees on the basis of the value to the recipient. And that's what the IOAA means. And if we read it that way, then of course it's not an overly broad delegation of authority. And that's how the Court avoided the constitutional issue and also spawned this statutory interpretation of the IOAA where the value to the recipient, the statutory language, that particular phrase, becomes very, very important for assessing a fee under the IOAA.

THE COURT: Now, when you say value to the recipient, you're talking about the recipient of the special services—

MR. GARDNER: Right.

THE COURT: —to the entity or individual—

MR. GARDNER: Right.

THE COURT: —paying the fee.

MR. GARDNER: Right.

THE COURT: All right. This is where I'm hanging up.

MR. GARDNER: Okay.

THE COURT: Because under this particular statute [31] that we're dealing with here, there doesn't appear to be any value to the recipients. In other words, there isn't any recipient. All there is is somebody who is being required to pay an assessment, but it isn't—doesn't strike me as being a situation where—which we traditionally think about and which the case said construed as a fee. We're talking about a user's fee, but we're talking about companies who are using their own pipelines, are paying for the maintenance of their own pipelines. Unless you could say that the companies are using these agencies for something—and my understanding is all the Department of Transportation or the Department of Energy is doing here is regulating these

pipelines, that there are not any particular permits or certificates or certificates of convenience and necessity that are obtained from this agency that is necessary in order for these companies to remain in business.

So, you know, we go—and I agree with you, that the Court is hung up on value to the recipient or some special benefit. If there is no special benefit here, if there is no value to this particular recipient, where do we go from there?

MR. GARDNER: Well, okay, where we go from there is at the most—the worst conclusion for the government that you could draw from that is that this is a tax and not a fee. As I said before, and let me just, you know, make it perfectly clear we think it's a fee, and we think it's a fee under [32] Massachusetts versus United States, we think it's a fee under National Cable. You have our arguments.

But suppose you reach that worst conclusion for the government that it's a tax. All right, it's a tax. Still, you know, we have the text of the statute here, and it's—okay, it's going to be a tax, and still the only constitutional challenge that the plaintiffs are raising is whether it's an improper delegation of the taxing power.

Now, the taxing power can be delegated. If it couldn't be, as you mentioned to Mr. McMillan before, we'd have a big problem with the IRS. We'd have to shut them down.

THE COURT: Well, it seems we're going back around here, then, this distinction of what are we delegating here. We're delegating some function to this agency in connection with the raising of revenue. And I'm going to call that, the revenue being raised, a tax, going to do it by virtue of the tax, because I'm pretty well convinced from a review of these cases that at least the weight of authority would be that under these circumstances what we're dealing with is a tax. And I think I do counsel a disservice if

I've pretty much come to that conclusion, and based on the arguments which I've read, if I ask you to go over all that again. And rather let you spend your time in those areas where there is still some question, at least in my mind.

Then aren't we back down to what are we doing here? [33] Are we making—are we making taxing decisions? In other words, a decision that's necessary inherently that can only be exercised in connection with a taxing power, or are all we doing here is collecting the tax and interpreting the power that has already been exercised? In other words, all we're doing here is providing definitions of those words or those terms which—which have been defined by Congress need further definition. And that's where I am right now. What is this agency doing?

MR. GARDNER: Okay. There is a difference, an important difference between delegation and abdication. And it's a difference that the plaintiffs are fudging. Nobody here is going to stand up and say Congress can abdicate its power, any power. It can't. And that's what those nondelegation cases, Schector Poultry and all those say.

But that hasn't happened here. Congress has not abdicated its taxing power, again assuming that this is a tax. What—the way that you framed the question for me, Your Honor, is—is that Congress has exercised its taxing power. That's what this statute is. It's a tax on pipeline usage.

Now, the fact that Congress gave, you know—okay, how do we analyze that? The Supreme Court has given us guidance. It's given us guidance in the Hampton case where it told us that all we need to find in order to sustain the statute is an intelligible principle. Well, I would submit [34] that the intelligible principle, the minimum intelligible

principle that's required here is met by the—by the nature of the statute itself. The principle is there shall be a tax on pipeline usage.

Now, if that's all that Congress had said, under the Hampton decision this would be a constitutional statute. If Congress had said there shall be a tax on pipeline usage that shall cover pipelines that transport hazardous liquids in interstate commerce, that would be a permissible delegation of congressional—of the congressional taxing power. But Congress has gone so much farther here. They've said who's going to be taxed. They've identified those people with great care by incorporating by reference the provisions of the hazardous liquid and natural gas pipeline safety acts which define with enormous precision who is going to be subject to regulation. And that definition is incorporated here. So they've said who's going to be taxed.

They've said how much is going to be taxed. In Section D of the statute, it provides that Congress, through its appropriation process, will set the limit on how much can be raised by this fee. They have gone farther. They have said what the money can be used for in Section C of the statute. And they've confined its uses to certain very narrow areas that—again, by reference to these natural gas and hazardous liquid acts.

[35] So, you know, is this a proper delegation, is this a permissible delegation within the meaning of Hampton and American Power and Light. Absolutely. It goes much, much farther, the statute does, in detail, than Congress needed to go.

And Mr. McMillan told you Congress doesn't need to delegate this to DOT. Congress has no reason to let DOT decide these things. But that's not the issue. The issue is not whether Congress had to do this, or whether they

needed to do this, or whether there was a good reason for them to do it, but they did it, and the question is was it constitutional. And I think the court need not look any further than the Hampton and American Power cases to conclude that it is constitutional.

THE COURT: Okay, thank you.

MR. GARDNER: Can I just add one point? In terms of this chart, I would like to, for the moment, object to this. It's—as I understand, it's based on hearsay, and there's no foundation, and since it's not admissible in evidence it's improper to consider under Rule 56, summary judgment motion. But what I will do is study it, and if I can stipulate to the figures here, I will do so. That's it, if you have no more questions.

THE COURT: The objection to this exhibit will be sustained at this point. Not that that's any indication of [36] any great momenta in summary judgment motion. The point of the exhibit I think was made in briefs before this was even submitted, that due to the different methods set out by Congress of implementing this tax, that there would be a great disparity between particular pipeline companies, depending on which method was used, and the amount of the funds to be paid by each particular company. And I—frankly, I got the point prior to looking at the chart. So—

MR. MCMILLAN: Your Honor, I don't want to prolong this unnecessarily, so let me just make a couple of brief remarks. I'd like to very briefly say something about Hampton, very briefly say something about government counsel's point that Congress has decided how much the tax is going to be, and finally refer Your Honor to the Tenth Circuit decision in Nevada Power, which I think is constructive on various of the issues.

With respect to Hampton, the notion that somehow Hampton, which was decided in 1928, supersedes National

Cable, which was decided in 1974, is precisely wrong given the fact that National Cable cites Hampton, it deals with Hampton. It deals indeed with both Hampton and Schlector, which is the 1935 decision that stands for the proposition that some powers can't be delegated at all. And National Cable holds very specifically that one of the two—one of two things is possible. Not—one of two things is true; either it can't [37] be delegated at all under Schlector, or it can be delegated only within confined limits not met by the statute here under Hampton.

Hampton, if you read it, is entirely consistent with National Cable, in the sense that that was a custom fee situation. In Hampton, you got—you paid a custom duty for the privilege of importing. And on the facts, there's simply no conflict between the decisions. And given the fact that National Cable deals with Hampton, I don't think that's—there's much more to be said about that.

The important issue which Your Honor has already focused on, correctly, I think, if I can put it in the context of what government counsel has just said, is that we need not be concerned here particularly with the fact that Congress has decided how much the industry shall be taxed. We're not here worrying about what the industry should be taxed. We're interested in what Mid-America is going to be taxed.

Congress has made a decision that was exactly the same decision they made in National Cable and New England Power; namely, recover all of your costs from industry. The problem and the reason why this is a delegation of the taxing power is that Congress has turned over to the DOT the issue of how much will Mid-America pay. And it isn't a slight variation that we're talking about. There are profound differences in how much we're going to pay, and it is strictly [38] a function of DOT's discretion.

The third point I'd like to make is I'd like to refer Your Honor's specific attention the Nevada Power Company versus Watt case, which is 711 F. 2d—

THE COURT: I've got it in front of me.

MR. MCMILLAN: That's an instructive case, because in that case the Court wasn't dealing with the IOAA. In that case, like this case, they were dealing with a different statute, a new statute that purported to give the agency specific authority to charge the regulated companies certain amounts of money for certain things. And let me just quote two of the Court's specific holdings, both of which are holdings that apply National Cable to this other statute.

The first is on page 931, on the right-hand column, where the Court, right before the heading "retroactive application", tells the Interior Department to go back, recalculate what we're talking about here, and take into account the, quote, "warning in National Cable and New England Power that an applicant may not be charged for work relating to the agency's general cost of administration".

And on the—two pages later, on page 933 in holding number fifteen, it says Interior may, consonant with National Cable, do certain things. Cover the full cost of services provided to the company, et cetera [*sic*]. But in the next—in the two sentences later, it says Interior may not charge Colorada [*sic*] [39] Ut. with general management costs and other expenses not incurred in agency action relating specifically to Colorado Ut.'s application", citing the Mississippi Power decision.

Nevada Power stands specifically for the proposition that when Congress passes a new law that attempts to delegate the taxing authority to a federal agency, the constitutional principles enunciated in National Cable prevent that delegation and require it declared unconstitutional if it

does certain of the things described in this opinion. I think that's precisely the analogous fact pattern we have here, and we hope Your Honor will rule in favor of our motion.

THE COURT: Thank you. Does the government have anything further?

MR GARDNER: Since you've given me the opportunity, let me just say one thing that I said before, because I just want to make sure that the court keeps in mind the distinction between delegation and abdication. Even Schector Poultry, which was one just referred to, did not hold that Congress can't delegate its authority. It didn't hold that at all. It said that Congress can't abdicate its authority. And I think if we keep that in mind, that what is impermissible is an abdication, and what is or may be very easily permissible is a delegation, then I think that will draw the right distinction for the court and will show that this statute is constitutional. Thank you.

[40] THE COURT: Anything further?

MR. MCMILLAN: No, Your Honor. Thank you.

THE COURT: Well, I think we've had a pretty good hearing here on the merits. I will—do want to commend counsel for both sides. I thought the briefs in this case were excellent and enjoyed reading them. I think the arguments have been good also, and we've got a pretty good focus at this point.

Although it's my usual practice to try and announce decision from the bench, given the magnitude of the issue there, I'm not going to do that, but I will issue a written report and recommendation to Judge Ellison and hopefully get it out fairly promptly, although I try never to make any promises in that regard.

Very well. We stand in recess.
(Recess)

* * * * *

A TRUE AND CORRECT TRANSCRIPT.

CERTIFIED: /s/ ELDON R. SIMPSON
Eldon R. Simpson, C.S.R.
U.S. Court Reporter

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Research and Special Programs Administration

Pipeline Safety User Fees

This notice states the policies and practices that the Research and Special Programs Administration (RSPA) has established to carry out the pipeline safety user fee provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("the Act") (Pub. L. No. 99-272; April 7, 1986) for fiscal year 1986. The Act requires that gas and hazardous liquid pipeline operators pay annual user fees to fund the cost of the Department's pipeline safety program. The fees are to be assessed and collected during each fiscal year before the end of the fiscal year.

The Act provides that the persons liable for the fees are those that operate (1) gas transmission lines subject to the National Gas Pipeline Safety Act of 1968 (NGPSA) (49 U.S.C. 1671 *et seq.*), (2) liquefied natural gas (LNG) facilities subject to the NGSPA, or (3) pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA) (49 U.S.C. 2001 *et seq.*) Gas transmission lines subject to the NGPSA are covered by the RSPA gas pipeline safety standards in 49 CFR Part 192. They include interstate and intrastate pipelines carrying natural gas, flammable gas or gas which is toxic or corrosive. Safety standards for LNG facilities subject to the NGPSA are contained in 49 CFR Part 193. The hazardous liquid pipeline facilities that are subject to the HLPSA include interstate and intrastate pipelines carrying petroleum, petroleum products or anhydrous ammonia. These pipelines are regulated under 49 CFR Part 195. Pipelines transporting other liquid substances could at some future time become subject to the user fee provisions of the Act if RSPA determines that the pipeline transportation involved poses an unreasonable risk to life or property and issues safety standards for that transportation under the HLPSA.

Fee Schedules

The Act requires that the Secretary of Transportation establish a schedule of fees for pipeline usage, bearing a reasonable relationship to miles of pipeline, volume-miles, revenues, or an appropriate combination thereof. Also, the Secretary must take into account the allocation of Departmental resources in establishing the schedule.

To help decide upon an appropriate basis for determination of fees, in April RSPA consulted the pipeline industry's major trade associations: The American Petroleum Institute, the American Gas Association, the Interstate Natural Gas Association of America, and the Association of Oil Pipe Lines. The consensus was that pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities. After further consideration, RSPA adopted pipeline mileage as the fee basis.

For gas transmission lines, mileage data are available from the transmission and gathering system annual reports, which 49 CFR 191.17 requires operators to file by March 15 each year. Each report provides the miles of transmission lines each oeprator has at the end of the calendar year for which the report is filed. For the fiscal year 1986 user fee assessments, RSPA will use the mileage submitted in the 1984 calendar year report, because the data in the 1985 reports are not yet in useable form. RSPA expects that a similar practice (use of year before last calendar year data) will be applied to assessments in subsequent fiscal years, because most likely, the receipt and computerized tabulation of annual report data will lag behind the need for user fee mileage data.

For hazardous liquid pipelines, RSPA does not have mileage data, because liquid pipeline operators have not

been required to report this information. Therefore, through direct correspondence, RSPA has asked operators of pipelines subject to the HLPSA to submit mileage data. The data collected will serve as the fee basis for fiscal year 1986. For use in later fiscal years, RSPA plans to adopt an annual reporting requirement for hazardous liquid pipelines, which would provide data such as pipeline mileage.

A fee basis other that mileage is needed for LNG facilities. For these facilities, RSPA decided that storage capacity is the most readily measurable indicator of usage as well as allocation of RSPA resources. The storage capacity of each LNG facility that is subject to the user fee provisions of the Act is published in a report by the Liquefied Natural Gas Committee of the American Gas Association titled "LNG 1983-84 Report" (January 1986). RSPA has used data from this report for fiscal year 1986 assessments.

With storage capacity as the basis, a five step fee schedule was developed for LNG facilities. It provides an appropriate means of relating the fees to usage and resource allocation, taking into account the wide spread (approximately 900:1) in facility storage capacities. The schedule is set forth below under "Assessments."

Assessments

The Act provides that the fees received for any fiscal year may be as much as 105 percent of the appropriation for that fiscal year for activities authorized by the NGPSA and the HLPSA. The amount Congress appropriates annually for the pipeline safety program therefore would normally be the bench mark for the total amount of fee assessments.

Because at this point in this fiscal year RSPA can more accurately determine the costs of the program, RSPA will

assess total fees for fiscal year 1986 that will not exceed the projected fiscal year 1986 expenditures plus a 5 percent allowance.

Each operator of jurisdictional gas transmission lines or hazardous liquid pipelines will be assessed a share of RSPA's total pipeline safety program costs in proportion to the miles of transmission or hazardous liquid pipelines that person had in service at the beginning of fiscal year 1986. Total (liquid and gas) program costs include administrative expenses (salaries, travel, printing, communication, supplies, etc.), regulatory, enforcement, training and research costs, and State grants-in-aid. This total, not including grants, has been allocated 80 percent for gas and 20 percent for liquid, based on the fiscal year 1986 budget submission to Congress. Grants will be allocated 95 percent for gas and 5 percent for liquid. In making the gas transmission assessments, the total gas program costs will be reduced by approximately 5 percent to account for LNG program expenditures as explained below.

Each operator of an LNG facility in service at the begining of fiscal year 1986 will to be assessed a designated share of the LNG program costs based on the storage capacity of the facility. For FY-86 these costs are estimated to be approximately 5 percent of the total gas program costs. This percentage represents the approximate ratio between the allocation of resources to LNG facilities and the total allocation of resources to all gas facilities.

Therefore, gas transmission line operators will be assessed according to the following formulas:

Total gas program cost = (80%) (total program cost − total grants) + (95%) (total grants)

Total transmission user fees = (105%) (Total gas program cost) − Total LNG User Fees

$$\text{Assessment per mile} = \frac{\text{Total transmission user fees}}{\text{Total miles}}$$

Operator Assessment = Assessment per mile × Operator miles

For FY-86 the Gas Transmission Pipeline Assessment per mile is $23.99.

Hazardous liquid pipeline operators will be assessed similarly:

Total liquid program cost = (20%) (Total program cost − total grants) + (5%) (total grants)

Total liquid user fees = (105%) (Total liquid program cost)

$$\text{Assessment per mile} = \frac{\text{Total liquid user fees}}{\text{Total miles}}$$

Operator assessment = Assessment per mile × Operator miles

For FY-86 the Hazardous Liquid Pipeline Assessment per mile is $6.41.

The total user fees for LNG facilities will be calculated as follows:

Total LNG user fees equal approximately (105%) (5%) (Total gas program cost)

For FY-86 LNG operator assessments will be as follows:

LNG Facility storage capacity	Operator assessment
Less than 10,000 bbl.	$1,250.00
10,000 bbl. but less than 100,000 bbl.	2,500.00
100,000 bbl. but less than 250,000 bbl.	3,750.00
250,000 bbl. but less than 500,000 bbl.	5,000.00
500,000 bbl. or more	7,500.00

Exemption of Small Mileage Operators

A review of the operator mileage data and assessment fees showed that there were 23 percent of the gas operators

with less than 10 miles of pipelines subject to the user fee. These operators averaged 4.25 miles which would result in an average assessment of approximately $100. Similarly, 17 percent of the liquid operators had less than 30 miles of pipelines. These operators averaged 12.29 miles which would result in an average assessment of approximately $80.

It has been estimated that the administrative costs associated with each user fee assessment would approach if not exceed these average assessment amounts, resulting in a zero dollar benefit. Therefore, RSPA has reached an administrative decision to exclude from assessment operators of less than 10 miles of gas transmission pipeline and operators of less than 30 miles of liquid pipeline.

Charges by State Agencies

A few State agencies (most notably the California State Fire Marshal) that participate in the Federal/State cooperative program to enforce the Federal pipeline safety standards are charging pipeline operators to fund the cost of State programs. Some operators may feel that the new Federal user fees for pipeline facilities in those States will unfairly duplicate the program charges the States are making. There should be no duplication, however, if a State's charges are not more than necessary to meet the State's share of the State pipeline program costs, since the State's share is not part of the costs to be funded by Federal user fees. The cost of a State's pipeline safety program is reduced by any amount it receives in Federal-grant-in-aid funds. If a State's charges are not to exceed its program costs, those charges should be reduced by an amount equal to the grant funds received, less State administrative costs assignable to managing those funds.

Collection Procedures

Assessment notices to all known operators of assessable facilities will be mailed in the latter part of July 1986, stating the operator's pipeline mileage or LNG storage capacity, as appropriate, and the fee that is due. Payments in full must be received no later than 30 days after the date notice is mailed. Each operator will be asked to pay by certified check or money order payable to the U.S. Department of Transportation, and identified as payment of the pipeline user fee. Payment should be sent to the address stated in the assessment notice. All monies received will be transmitted to a special account at the U.S. Treasury.

The RSPA Register of User Fees will review each user fee payment and notify an operator if any irregularity is discovered.

Payments not received by the due date will be subject to allowable interest charges (31 U.S.C. 3717). Follow-up demands for payment and other actions intended to assure timely collection, including referral to local collection agencies or court action, will be conducted in accordance with the Federal Claims Collection Standards (4 CFR Chapter II) and Departmental procedures.

Adjustments

As stated above, fiscal year 1986 fees for gas transmission line operators will be based on calendar year 1984 mileage data. For LNG facilities, fees will be based on storage capacities published in "LNG 1983-84 Report." Fees for hazardous liquid pipeline operators will be based on information currently being collected from operators or otherwise available. An operator who believes it is being overcharged because the mileage of LNG storage capacity stated in the assessment notice exceeds the miles of pipeline or LNG storage capacity that operator had in

service at the beginning of fiscal year 1986 (October 1, 1985) may request a fee adjustment at the time of payment. Requesting a fee adjustment does not relieve the operator of the obligation to pay the full amount of the assessment. The Register of User Fees will resolve each request for adjustment. Adjustments will not be made for pipeline or LNG facilities removed from service during fiscal year 1986. Also, because each assessment is for usage "reasonably related" to mileage (capacity), adjustments will not be made for minimal difference in mileage (capacity). Adjustments will be made by subtracting the recognized overcharge from the fiscal year 1987 assessment.

Public Participation

RSPA invites interested persons to participate in the development of policies and practices to be followed in making user fee assessments for fiscal year 1987 by commenting on any of the topics in this notice. Although the policies and practices described in this notice are final for purposes of fiscal year 1986 assessments, all comments received will be considered in determining whether the fiscal year 1986 policies and practices should be continued, modified, or replaced for use in fiscal year 1987. A notice announcing the policies and practices for fiscal year 1987 assessments will be published in the **Federal Register** in the fall of 1986.

Interested persons should submit comments in writing, identifying the title of this notice, by September 2, 1986 to the Director, Office of Pipeline Safety, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 20590. Comments received after that date will be considered so far as practicable.

Issued in Washington, DC on July 11, 1986.

Robert L. Paullin, *Director, Office of Pipeline Safety.*

Federal Register / Vol. 51, No. 248 / Monday, December 29, 1986 / Notices

Research and Special Programs Administration

Pipeline Safety User Fees

This notice states the policies and practices that the Research and Special Programs Administration (RSPA) has adopted to implement the pipeline safety user fee provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Reconciliation Act) (Pub. L. No. 99-272; April 7, 1986). The policies and practices are in effect for fiscal year 1987, which began October 1, 1986. They will also apply to ensuing fiscal years unless changed by further notice.

Background

Section 7005(a)(1) of the Reconciliation Act requires the Secretary of Transportation (whose responsibility in the matter is executed by RSPA) to establish "a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." The Secretary is to "take into consideration the allocation of departmental resources" in establishing such schedule. Procedures for the collection of fees must be established under section 7005(a)(2).

According to section 7005(a)(3) of the Reconciliation Act, the fees are to be assessed to persons operating:

(A) All pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 [HLPSA] (49 U.S.C. app. 2001 *et seq.*); and

(B) All pipeline transmission facilities and all liquefied natural gas [LNG] facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 [NGSPA] (49 U.S.C. app. 1671 *et seq.*).

However, under section 7005(c) the use of the fees collected is restricted to "activities" authorized by these two safety statutes. Thus, the fee assessments are limited to persons who operate pipeline facilities that are subject to RSPAS's pipeline safety regulations. In category (A) above, these facilities include those interstate and intrastate pipelines carrying petroleum, petroleum products, or anhydrous ammonia covered by 49 CFR Part 195. Category B includes interstate and intrastate natural gas transmission lines subject to 49 CFR Parts 191 and 192, and liquefied natural gas facilities to which 49 CFR Part 193 applies. Because the jurisdiction of the HLPSA is broader than the current scope of Part 195, if RSPA were to issue regulations under the HLPSA for liquid pipeline facilities not now covered by Part 195, the operators of these facilities would then become liable for user fees. Such facilities might include pipelines carrying liquids not now classified as hazardous under Part 195; pipelines carrying petroleum, petroleum products, or anhydrous ammonia by gravity or at a stress level of 20 percent or less of the specified minimum yield strength of the pipe; and terminal storage facilities associated with hazardous liquid pipelines.

On July 16, 1986, RSPA published a notice in the **Federal Register** (51 **FR** 25782) announcing its user fee policies and collection procedures for fiscal year 1986. Adopting an alternative permitted by the Reconciliation Act, RSPA established the fee schedule for pipelines as a pro rata share of total program costs based on the number of miles of pipeline (gas transmission or hazardous liquid) each operator had in service at the beginning of fiscal year 1986. The mileage of gas transmission lines was determined from calendar year 1984 annual reports filed in accordance with Part 191. Adjustments were permitted for any overcharge due to mileage discrepancies between

calendar year 1984 and fiscal year 1986. The current mileage of hazardous liquid pipelines was determined by operator inquiry.

The Reconciliation Act sets a limit on fee assessments of 105 percent of fiscal year appropriations. However, for fiscal year 1986, user fees were based on 105 percent of projected total program costs, since these costs could be accurately determined at the time of assessment, which was late in the fiscal year. In accordance with the directive to consider the allocation of departmental resources, total program costs were divided 80 percent for gas and 20 percent for liquid, less the costs of State grants-in-aid, in accordance with fiscal year 1986 budget estimates.

Thus allowing for the 95 percent/5 percent authorized split of appropriated grant-in-aid funds between gas and liquid State programs and the 5 percent of gas program costs allocable to LNG activities, the fiscal year 1986 fee schedule for pipelines was as follows:

User fee per mile equals Gas (liquid) pipeline user fees divided by Total gas transmission (liquid) miles

Gas pipeline user fees equals (1.05) (gas program costs) minus Total LNG user fees

Liquid pipeline user fees equals (1.05) (liquid program costs)

Gas program costs equals (.8) (Total program cost minus total grants) plus (.95) (total grants)

Liquid program costs equals (.2) (total program costs minus total grants) plus (.05) (total grants)

To save disproportionate collection costs, operators with less than 10 miles of gas transmission lines or 30 miles of hazardous liquid pipelines were exempted from any fee assessment.

The user fee schedule for LNG facilities was established on the basis of storage capacity and number of LNG plants.

LNG facility storage capacity (bbl.)		Number of plants	Operator assessment
At least	But less than		
	10,000	22	$1,250
10,000	100,000	16	2,500
100,000	250,000	18	3,750
250,000	500,000	24	5,000
500,000	....	14	7,500

This schedule resulted in a reasonable distribution of total fees, which were determined approximately as follows:

Total LNG user fees equals (1.05) (.05) (Gas program costs)

Public Participation

The relatively short time between enactment of the Reconciliation Act (April 17, 1986) and the deadline for collection of fees (September 30, 1986) made it impracticable for RSPA to provide a suitable period for public comment before the policies and practices for fiscal year 1986 fee assessments were formulated and adopted as final. In its notice of fiscal year 1986 policies, RSPA did, however, invite interested persons to comment on them to help determine whether they should be continued, modified, or replaced for use in fiscal year 1987.

RSPA received written comments from 33 persons on its policies and practices for assessing user fees. Most of the comments came from pipeline companies in the form of a protest letter accompanying payment of the fee and objecting to any assessment of a user fee. The others, from pipeline companies, trade associations, and State agencies, were in response to the invitation to comment included in the notice.

Assessing Local Distribution Companies

About 40 percent of the commenters objected to assessment of fees against intrastate pipelines that are under the safety regulatory jurisdiction of a State agency. Of this group, some contended that Congress did not intend to impose pipeline user fees on local gas distribution companies. They based their arguments on the legislative history. In particular, an excerpt from House Report 99-300 was cited, wherein at page 497 the Energy and Commerce Committee (the Committee) states the following with reference to a Committee print which formed the basis for the pipeline user fees provision of the Reconciliation Act:

> In addition, under paragraph (a)(2), the Secretary may establish such procedures as are necessary for ease of administration and to prevent inefficient, duplicative, or counter-productive collection costs. The Committee expects that DOT will not ordinarily impose user fees on local distribution companies. Some of these companies are so small that the cost of collecting the fee may equal or even exceed the company's fair share of total program costs. Moreover, to the extent that transmission pipelines serving them lawfully pass on user fees to them in their rates, local gas distribution companies are in reality contributing to DOT's safety program costs.

These commenters focused attention on the Committee's expectation that "DOT will not ordinarily impose user fees on local distribution companies." Of course, even when viewed out of context, "not ordinarily" does not mean never, leaving room for assessment in some cases. When viewed in its proper context though, it's clear that the Committee had something in mind other than wholesale exemption of local distribution companies. The Committee was concerned that the Secretary's collection proce-

dures be designed to minimize the costs of collecting fees. This RSPA did by exempting from assessment operators with less than 10 miles of transmission lines. Had the Committee intended that all local distribution companies be exempt from paying fees, it certainly could have included in the bill specific language that would have exempted them, but it did not.

Furthermore, the Reconciliation Act, as reported out by conference and enacted, eliminated much of the discretion the Committee originally provided the Department in its bill in regard to imposition of fees. In the Act the scope of assessment was narrowed to operators of transmission facilities and LNG facilities. Based on a reasonable reading of section 7005(a)(3) of the Reconciliation Act, which clearly imposes fee liability on persons that operate all pipeline transmission facilities, RSPA does not agree that Congress intended to exclude local distribution companies from user fee assessments. Section 7005(a)(3) further supports this conclusion by extending liability for fees to operators of LNG facilities. Most of these facilities are operated by local distribution companies.

Another argument often raised by local distribution companies was that the fee assessments were unfair, since they would have to pay twice; once directly, and then indirectly when their gas suppliers, the interstate transmission companies, pass their assessments to them in the form of increased rates. Although it is not a foregone conclusion that all assessments to interstate transmission companies will simply be passed to local distribution companies and industrial customers, RSPA believes that this is a likely result. However, it is equally likely that any costs passed through to the local distribution companies will in turn be passed on to their customers, the consumers of gas. This ability of local distribution operators to pass fee

costs to consumers significantly lessens the alleged inequity of having to pay twice.

In considering this fairness issue, RSPA notes that Congress left the Department little discretion in making assessments, by declaring which facilities are subject to user fees. Furthermore, Congress was aware of the fairness issue. As reported on page 494 of House Report 99-300, the Committee recognized RSPA's concern about "whether it would be fair to assess fees against just the largest users." In addition, the Committee recognized the General Accounting Office view: "We believe that it is equitable for interstate pipeline operators and their customers to finance DOT's safety inspections, because the risks that these inspections reduce are entirely created by the pipeline operations." (It is important to understand that the customers of interstate pipeline operators that GAO thought it equitable to assess are to a very large extent local distribution companies). The Committee resolved the equity concern by concluding that "imposition of such fees would be an extremely small financial burden on pipeline operators, and customers."

Pipeline Transmission Facilities

A few local distribution companies also argued that the "transmission lines" in their systems are not the type of "pipeline transmission facilities" that Congress intended to subject to user fees. They said that their pipelines only meet the structural definition of "transmission line" for reporting purposes under Part 191 (i.e., operates at a hoop stress of 20 percent or more of specified minimum yield strength). Accordingly, they do not meet the functional aspects of the definition (i.e., transmit gas from production to storage or between storage fields, or for making wholesale sales). (The definition of "transmission line" is

contained in the instructions for completing the Annual Report for transmission and Gathering Systems, Form RSPA 7100.2-1, which under 49 CFR 191.13 must be filed with RSPA by operators of intrastate distribution systems that contain transmission lines. The same definition appears in 49 CFR Part 192.) These commenters, however, did not explain how the structural versus functional distinction is significant under the Reconciliation Act and RSPA can discern no significance.

In the absence of a definition of "pipeline transmission facilities" in the Reconciliation Act or any discussion of the meaning of the term in the legislative history, RSPA applied the established regulatory definition of "transmission line." Applying the term in this way constitutes a reasonable interpretation of its meaning. It also facilitates the administration of users fees by enabling RSPA to use available mileage data for transmission lines. Considering that fees collected from operators of "pipeline transmission facilities" are to fund RSPA's activities under the NGPSA, it is fair to assume Congress meant the term to be applied consistent with the terminology of regulations issued under the NGPSA.

Jurisdiction Over Intrastate Pipelines

Some commenters who operate intrastate pipelines that are under the safety jurisdiction of a certified State agency argued that these pipelines are not legally subject to pipeline user fees because they are not subject to the NGPSA or the HLPSA. The notion that these pipelines are not under the jurisdiction of the NGPSA or the HLPSA comes from a provision in each statute which excludes them from DOT's authority "to prescribe safety standards and enforce compliance with such standards." (49 USC app. 1674 and 2004).

The purpose of this provision, however, is to allow certified State agencies, rather than DOT, to enforce the Federal safety standards against intrastate pipelines under State jurisdiction. It by no means removes these intrastate pipelines from DOT's general regulatory authority under each statute. This general regulatory authority includes the power to issue safety standards applicable to intrastate pipelines that are later adopted and enforced by certified State agencies, the power to issue and enforce hazardous facility orders against intrastate pipelines, the authority to collect information or require accident reports from operators of intrastate pipelines, and the authority to inspect intrastate pipelines to monitor the performance of certified State agencies in enforcing compliance with the Federal standards. Inasmuch as intrastate pipelines under the enforcement authority of a certified State agency still come under the NGPSA or HLPSA for these general regulatory purposes, and DOT conducts activities to carry out these purposes, the user fee assessments against these intrastate pipelines are legitimate under the Reconciliation Act.

Relating Fees to Grants-in-aid

Some intrastate operators and State agencies contended that DOT user fees for intrastate pipelines were unfair because they were not assessed in proportion to DOT's share of State enforcement costs as represented by the grant-in-aid payments to the State. These commenters were concerned that in States that pay more of their enforcement costs than other States, because they receive less grant-in-aid funds than other States, the fees DOT collects in excess of its grant-in-aid expenditures go to subsidize the enforcement programs of other States.

This alleged inequity arose because in fiscal year 1986 each pipeline operator was assessed a pro rata share, based on mileage, of DOT's total gas or liquid program costs, including total State grant-in-aid costs. Thus, in South Carolina, for example, which elects not to receive grant-in-aid funds, intrastate gas operators may have paid for some small portion of DOT's total gas program costs that were not actually incurred in South Carolina. This situation would have been minimized, of course, had South Carolina accepted the grant-in-aid funds that were available to it.

RSPA believes, however, that the Reconciliation Act does not allow the fee schedule to be established in relation to State-by-State grant-in-aid expenditures. The Act tightly controls RSPA's discretion in setting fees. Fees must be based on miles, volume-miles, or revenue, and in "consideration of the allocation of departmental resources." This last control on RSPA's discretion allows higher fees for facilities that demand a disproportionate share of DOT resources and allocation according to whether costs are due to gas or liquid lines. However, it would greatly expand the intent of this provision to establish fees on the basis of grants to State agencies.

No doubt more grant money is allocated to some States than others, but State sharing of Federal program costs is inherent in the Federal system of government. Any attempt to introduce State based expenditures into the fee schedules would require complex formulations that would only serve parochial not Federal interests. Moreover, it would require mileage or other data on a State basis, which is not available except through further industrial inquiries. In enacting user fees, Congress did not intend any formulation that would be unduly burdensome to administer. In view of these considerations and the controls

on discretion, RSPA has not changed its assessment policy to allocate fees according to State grant-in-aid allocations.

Mileage as Fee Basis

About 30 percent of the commenters objected to pipeline mileage as the basis for assessing fees. There were two main arguments raised against using mileage as the fee basis: (1) Volume-miles is a more accurate indicator of the pipeline "usage" for which fees are assessed. (2) Mileage alone does not reflect DOT's enforcement expenditures which are focused more on pipelines of large capacity in populated areas, than on long, low pressure, small diameter lines in slightly populated areas.

RSPA recognizes there are good arguments in favor of using volume-miles rather than mileage as an assessment basis. However, in determining an appropriate assessment basis, RSPA favors pipeline mileage because it is simple to administer and serves as an indication of the allocation of resources. In RSPA's experience, long pipelines of small diameter require just as much if not more enforcement effort than shorter pipelines of large diameter. Furthermore, mileage was supported by the trade associations representing the industry that commented on the notice. Therefore, RSPA continues to believe that mileage is the best method for assessments, and will use mileage for the fiscal year 1987 fee assessments.

Administrative Procedure

A few commenters argued that the administrative procedure by which the user fee schedule was adopted was improper. These commenters objected to the lack of a comment period in advance of establishment of the fee schedule. RSPA regrets that because of the relatively short time between enactment of the Reconciliation Act (April

7, 1986) and the statutory deadline by which RSPA had to collect pipeline mileage data and assess and collect fees (September 30, 1986), it was impracticable to permit public participation in the development of the fee assessment and collection policies for fiscal year 1986. It was decided, however, to announce the fee assessment and collection policies in the **Federal Register** before formal assessment notices were mailed, and to request comments that would be considered for future fiscal year assessments. A comment period in advance of assessment was not required by the Reconciliation Act, and RSPA believes that publication of the July 16 **Federal Register** notice satisfied all legal obligations under the Administrative Procedure Act for publication of statements of agency policy and interpretation developed to implement the pipeline user fee provisions of the reconciliation Act.

Jointly Owned Pipelines

One of the commenters requested that jointly owned (or leased), or partnership pipelines, with undivided interests, be assessed only once. After payment of the fee, its cost would then be shared by agreement among the individual owners. RSPA did not deliberately assess a single pipeline more than once. But, this result could have occurred if the same pipeline was reported by each of the joint owners in annual reports submitted under Part 191 or in response to the mileage inquiries RSPA made last summer. Joint operators in this situation who believe they were overcharged for fiscal year 1986 may request an adjustment. To prevent any similar overcharges for fiscal year 1987, RSPA suggests that the operators involved notify RSPA as soon as possible which of them is to pay the fee. RSPA will then delete the overlapping mileage from its calculation of assessment per mile.

Method of payment

One commenter remarked that RSPA's policy of requiring certified checks or money orders within 30 days of assessment was too burdensome. The 30-day period was needed in 1986 to meet the Congressional intent that collections be made in the same fiscal year as costs incurred. Since this should not cause a problem in 1987, RSPA will allow operators at least 60 days after assessment before payment is due and interest charges begin to run. Also, upon further consideration, RSPA believes that payment by personal or corporate check is acceptable, and will be allowed in 1987 as an alternative to certified checks or money orders.

Hearing

Several operators requested an opportunity to meet with RSPA to discuss the arguments they made against the user fee policies. These requests have not been granted because the issues raised were not unusual, and adequate nonconflicting information germane to the issues was available from other sources without holding an individual or public hearing.

Fiscal year 1987 Assessments and Collection Procedures

In consideration of the foregoing, RSPA has adopted the 1986 fee schedule for use in fiscal year 1987 and later years, with the exception that the amounts actually assessed will be based on fiscal year appropriations instead of projected total program costs.

Mileage data for gas transmission lines will continue to be taken from the calendar year annual reports. For liquid pipelines, however, the mileage collected in the summer of 1986 will be used until updated mileage information be-

comes available through establishment of an annual report requirement, which will be proposed next year.

The LNG assessments will be the same, but may vary proportionately in future years as expenditures changes.

The procedures for collecting fees will not change in 1987 except with regard to the payment method, as noted above, and in making necessary adjustments. Adjustments for mileage discrepancies will be made by subtracting the amount of recognized overcharge from the amount due or by remitting any overpayment, instead of making a deduction from the subsequent fiscal year assessment. However, if at the end of a fiscal year the actual program costs are less than the fiscal year assessments based on appropriations, the difference will be applied as a credit to reduce the next year's assessments.

The assessments for fiscal year 1987 should be mailed in February 1987. Mailings in future years will depend on the timing of fiscal year appropriations, but should not be sooner than February of the fiscal year concerned.

Issued in Washington, DC on December 22, 1986.

Robert L. Paullin, *Director, Office of Pipeline Safety.*

Supreme Court of the United States

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

APPEAL from the United States District Court for the Northern District of Oklahoma. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

OCTOBER 3, 1988

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3

No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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35 pp

QUESTION PRESENTED

The Department of Transportation administers pipeline safety programs under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a), directs the Secretary of Transportation to recover the costs of administering those two pipeline safety programs by assessing and collecting fees from pipeline operators. The question presented is whether Section 7005 is an unconstitutional delegation of the legislative power of taxation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	6
Argument:	
Congress acted constitutionally when it gave the Secretary of Transportation discretion to select among prescribed methods for assessing fees to recover the costs of the government's pipeline safety programs	8
I. Introduction	8
II. Congress's power to tax is not subject to greater restrictions on delegation than its other Article I powers	10
III. The fees collected under Section 7005 are not taxes	21
IV. Section 7005 is constitutional when measured against the established standards for determining whether there has been an excessive delegation of legislative power	26
Conclusion	29

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 9

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 5, 8-9, 26

Bob Jones University v. *United States*, 461 U.S. 574 (1983) 10, 19

Bowsher v. *Synar*, 478 U.S. 714 (1986) 8

Clyde Mallory Lines v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935) 22, 25

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 9

Cases – Continued:

	Page
Currin v. *Wallace*, 306 U.S. 1 (1939)	10
Erie R.R. v. *Board of Public Utility Comm'rs*, 254 U.S. 394 (1921)	9
FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976)	9-10, 17, 18
Field v. *Clark*, 143 U.S. 649 (1892)	9, 14
Florida Power & Light Co. v. *United States*, 846 F.2d 765 (D.C. Cir. 1988)	11, 17
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	28
FTC v. *R.F. Keppel & Bro.*, 291 U.S. 304 (1934)	11, 28
Head Money Cases, 112 U.S. 580 (1884)	21, 22, 23, 24
Hylton v. *United States*, 3 U.S. (3 Dall.) 171 (1796)	13
INS v. *Chadha*, 462 U.S. 919 (1983)	8, 20, 21
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928)	5, 15, 27
Lichter v. *United States*, 334 U.S. 742 (1948)	10, 11, 28
Marbury v. *Madison*, 5 U.S. 1 (1 Cranch) 137 (1803)	8
Massachusetts v. *United States*, 435 U.S. 444 (1978)	23
Myers v. *United States*, 272 U.S. 52 (1926)	20
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)	10, 28
National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974)	7, 15, 16, 17, 24
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932)	28
Opp Cotton Mills, Inc. v. *Administrator Wage and Hour Div.*, 321 U.S. 126 (1941)	27
Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935)	9, 10, 20
Springer v. *Government of the Philippine Islands*, 277 U.S. 189 (1928)	8
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940)	10, 11
Synar v. *United States*, 626 F. Supp. 1374 (D.D.C.), aff'd, 478 U.S. 714 (1986)	11
The Brig Aurora v. *United States*, 11 U.S. (7 Cranch) 382 (1813)	9
United States v. *Grimaud*, 220 U.S. 506 (1911)	9
United States v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939)	9, 27

Cases—Continued: Page

United States v. *Sharpnack,* 355 U.S. 286 (1958) 10
Wright v. *Nagle,* 101 U.S. 791 (1879) 8
Yakus v. *United States,* 321 U.S. 414 (1944) 9, 10, 27, 28

Constitution, statutes and regulations:

U.S. Const.:
Art. I 7
§ 1 2
§ 7, Cl. 1 (Origination Clause) 14
§ 8 (Taxing Clause) 2, 11, 12
§ 10, Cl. 2 22
Art. II 2
§ 3 ....2, 8, 11
Art. III 13
Act of Mar. 3, 1791, ch. 15, 1 Stat. 199 14
§ 43, 1 Stat. 209 14
Act of June 5, 1794, ch. 49, § 1, 1 Stat. 378 14
Act of July 6, 1797, ch. 11, 1 Stat. 527 14
§ 2, 1 Stat. 528 15
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82:
§ 7005, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) 2, 3
§ 7005(a)(1), 100 Stat. 140 .... 4, 26
§ 7005(a)(3), 100 Stat. 140 4
§ 7005(b), 100 Stat. 140 4
§ 7005(c), 100 Stat. 140 4
§ 7005(d), 100 Stat. 141 26
Department of Transportation and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-457, Tit I, 102 Stat. 2143-2144 4-5
Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* 4, 5
Internal Revenue Code (26 U.S.C.):
§ 1502 10
§ 4997 10
§ 7805(a) 10
§ 7805(b) 10

Statutes and regulations—Continued: Page
Independent Offices Appropriation Act of 1952:
31 U.S.C. 9701 16
31 U.S.C. 9701(b)(2)(B) 16
31 U.S.C. 9701(b)(2)(C) 16
31 U.S.C. 9701(b)(2)(D) 16
Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.* 4
Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 17
7 U.S.C. 16a 25
35 U.S.C. (& Supp. IV) 41 ....
19 C.F.R. 24.23 25
40 C.F.R. Pt. 180 25

Miscellaneous:
Brutus, No. 6 (1787), *reprinted in* 2 P. Kurland & R. Lerner, *The Founders' Constitution* (1987) 13
2 J. Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836) 12
Gillette & Hopkins, *Federal User Fees: A Legal and Economic Analysis,* 67 B.U.L. Rev. 795 (1987) 17
W. Gwyn, *The Meaning of the Separation of Powers* (1965) 20
H.R. Rep. 99-300, 99th Cong., 1st Sess. (1985) 23, 26
2 P. Kurland & R. Lerner, *The Founders' Constitution* (1987) 12, 13
J. Locke, *Second Treatise* (1689) 19
Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 1 (1985) 21
2 J. Story, *Commentaries on the Constitution of the United States* (2d ed. 1951) 14
The Federalist No. 48 (J. Madison) (C. Rossiter ed. 1961) 13

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2098

JAMES H. BURNLEY, IV,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The Findings and Recommendations of Magistrate (J.S. App. 1a-13a) are unreported. The Order of the district court adopting the Magistrate's recommendations (J.S. App. 14a) is also unreported.

JURISDICTION

The judgment of the district court (J.S. App. 15a-16a) was entered on February 9, 1988. A notice of appeal was filed on March 9, 1988 (J.S. App. 17a-18a). On April 29, 1988, Justice White entered an order extending the time within which to docket this appeal to and including June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. The Court noted probable jurisdiction on October 3, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, of the Constitution provides, in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States * * *."

Article I, Section 8, provides in pertinent part: "The Congress shall have Power to lay and collect Taxes, [and] * * * [t]o regulate Commerce * * * And * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article II, Section 3, provides in pertinent part, that the President "shall take Care that the Laws be faithfully executed."

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) provides:

PIPELINE SAFETY USER FEES.

(a) ESTABLISHMENT.

(1) SCHEDULE.—The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in a reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) COLLECTION.—The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any Federal, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) LIABILITY.—Fees established under this section shall be assessed to the persons operating—

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) TIME OF ASSESSMENT.—The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) USE OF FUNDS.—Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriation Acts, only—

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

(d) FEE SCHEDULE.—Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

STATEMENT

1. In 1986, Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82. Section 7005 of COBRA, 100 Stat. 140-141,

directs the Secretary of Transportation (Secretary) to adopt a system of fees to cover the costs of federal pipeline safety programs administered by the Department of Transportation (DOT) under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.*[1] Section 7005(a)(3), 100 Stat. 140, states that the fees "shall be assessed to the persons operating" pipeline facilities subject to the two safety Acts. The fees must be assessed prior to the end of each fiscal year (§ 7005(b), 100 Stat. 140), and must be sufficient to pay the costs of the two safety programs as "provided for in advance in appropriation Acts" (Section 7005(c), 100 Stat. 141). Section 7005(a)(1) of COBRA, 100 Stat. 140, directs the Secretary to base the fee schedule "on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines."

2. On July 16, 1986, the Secretary published fee schedules adopted pursuant to Section 7005 (J.A. 34-41). The Secretary selected "pipeline mileage" as the appropriate measure of each firm's fee. The Secretary reasoned that pipeline mileage is closely related to the covered regulatory costs (*e.g.*, the cost of inspection of pipelines). And the Secretary observed that the major pipeline trade associations had reached a consensus that "pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities" (*id.* at 35). For fiscal year 1986, the Secretary set fees of $23.99 per mile for gas pipelines and $6.41 per mile for hazardous liquid pipelines (*id.* at 38).[2]

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[1] Those Acts, in general, authorize the Secretary to establish national pipeline safety standards and to ensure compliance with those standards through enforcement measures including inspection.

[2] The federal program costs for the two pipeline safety programs were allocated 80% to gas pipelines and 20% to hazardous liquid pipelines (J.A. 37). Total federal costs of both programs for fiscal years 1986, 1987, and 1988 were $7.773 million, $8.523 million, $8.550 million, respectively. The projected federal costs for 1989 are $9.3 million. Department of Transportation

3. Appellee Mid-America Pipeline Company owns and operates pipelines that transport hazardous liquids. As such, appellee is subject to the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2000 *et seq.* (Complaint para. 3). On July 28, 1986, DOT, acting under its published schedule of fees, assessed appellee $53,023.52 to cover its share of the costs of administering the safety act (para. 10). Appellee then filed this suit, asserting that Section 7005 of COBRA is an unconstitutional delegation of Congress's taxing power. The district court referred the parties' cross-motions for summary judgment to Magistrate John Leo Wagner for a recommended decision.

On August 5, 1987, the Magistrate issued findings and recommendations (J.S. App. 1a-13a). The Magistrate stated that there were no genuine issues of material fact, and that two legal issues were presented: "(1) [W]hether the 'user fees' contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner" (*id.* at 1a-2a (footnote omitted)). The Magistrate concluded "that 'the fees' assessed under § 7005 are taxes" (*id.* at 5a). The Magistrate then discussed, but neither accepted nor rejected, appellee's contention that Congress is subject to special restrictions with respect to delegation of its taxing power (*ibid.*). Instead, the Magistrate (*id.* at 6a-11a) purported to analyze Section 7005 in light of this Court's decisions in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928), and *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946). The Magistrate found that Section 7005 leaves "the Secretary * * * free to appropriate the cost of regulation in almost any way [he] sees fit" (J.S. App. 9a). By not specifying the fee schedules, the Magistrate declared, Congress has permitted the Secretary to charge a company "almost any figure from 0-100% of the entire [pipeline safety] appropriation" (*id.* 10a).[3] The Magistrate concluded that

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and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-457, 102 Stat. 2143-2144.

[3] The Magistrate used a sample of six pipeline companies to show how the assessments could vary in accordance with the method of assessment selected

Section 7005 is unconstitutional because "[t]his statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use [his] discretion and set the rate of fees which is in fact a tax, and then go one step further and collect such taxes" (*ibid.*).

The Secretary filed exceptions to the Magistrate's report. On December 30, 1987, however, the district court entered a brief order (J.S. App. 14a) adopting the Magistrate's recommendations. On February 9, 1988, the district court entered a judgment (*id.* at 15a-16a) declaring Section 7005 unconstitutional and enjoining the Secretary from enforcing that section against appellee. The district court stayed its judgment pending appeal.

SUMMARY OF ARGUMENT

1. The separation of powers required by the Constitution does not forbid the Congress from giving the Executive Branch the authority to make subordinate rules to implement congressional will. Rather, Congress fulfills its constitutional role if it passes a law that announces Congress's general policy, designates the part of the Executive Branch that is to implement it, and sets out the boundaries of the Executive's authority. Under that test, this Court has repeatedly upheld statutes challenged on non-delegation grounds.

2. Congress's power to tax is not subject to greater restrictions on delegation than its other legislative powers enumerated in Article I of the Constitution. The language of the Constitution does not draw a distinction between Congress's various powers in terms of the permissible degree of discretion that may be conferred on the Executive Branch. Nor is there any evidence that the Framers of the Constitution made such a distinction.

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by the Secretary (J.S. App. 9a-10a, 12a-13a). The Magistrate found that appellee could have been charged anywhere from 5% to 28.3% of Congress's appropriation for the program (*id.* 9a). The figures that the Magistrate used were contained in an exhibit submitted by appellee that had been ruled inadmissible (J.A. 29).

The ratified Constitution gave the Congress sweeping powers to pass tax laws. The early congresses used the taxing power to pass general tax measures that called upon the Executive to make choices in implementing the laws. That early practice is persuasive evidence that Congress's power to tax is not subject to special restrictions against delegation.

Nothing in this Court's decision in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), casts doubt on the ability of Congress to pass a law that confers discretion on the Executive in matters related to taxation. When the opinion in that case is read in context and in light of this Court's later decisions, it is clear that *National Cable Television Ass'n* stands for the proposition that a tax statute, like any other act of Congress, is constitutional if it sets forth Congress's policy and channels the administrative process by defining the boundaries of the Executive's discretion.

3. Even if the Constitution does distinguish between the taxing power and other Article I powers for the purposes of the non-delegation doctrine, we believe that Section 7005 of COBRA should not be viewed as imposing a "tax." This Court has held that the government is not imposing a "tax," in the strict sense used by the Constitution, when it requires an entity to pay the costs of a government program made necessary by that entity's commercial activities. Rather, the government is imposing a "fee" that is properly viewed as one of the costs of doing business. Appellee is in the business of transporting hazardous liquids through pipelines. That activity imposes certain social costs as evidenced by the expense of administering the Hazardous Liquid Pipeline Safety Act. Section 7005 is designed to recover those costs by assessing fees on those persons responsible for creating the need for the government program.

4. Section 7005, when tested under the established non-delegation standards, does not delegate excessive authority to the Executive. The statute specifies the total amount of fees and the parties who are responsible for paying those fees. Section 7005 sets forth the exclusive factors that the Secretary may con-

sider, and it requires the fee schedules to be reasonable. The validity of Section 7005 is especially apparent when that provision is compared to other statutes that this Court has upheld against non-delegation challenges.

ARGUMENT

CONGRESS ACTED CONSTITUTIONALLY WHEN IT GAVE THE SECRETARY OF TRANSPORTATION DISCRETION TO SELECT AMONG PRESCRIBED METHODS FOR ASSESSING FEES TO RECOVER THE COSTS OF THE GOVERNMENT'S PIPELINE SAFETY PROGRAMS

I. *Introduction*

The Constitution divides the federal government "into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). The legislative power granted by Article I "is the authority to make laws." *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 202 (1928). The executive power created by Article II includes the authority to "take Care that the Laws be faithfully executed" (Art. II, § 3). And the judicial power conferred by Article III consists of the authority, in appropriate cases and controversies, "to say what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and whether the law has been violated. The Framers intended that those separate functions would serve as "the foundation of a structure of government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

The separation of powers required by the Constitution is not violated simply because Congress gives the Executive Branch the authority to implement congressional policies by adopting "quasi-legislative" (*Wright* v. *Nagle*, 101 U.S. 791, 792-793 (1879)) rules of general application. Congress fulfills its constitutional role when it "delineates the general policy, the public agency which is to apply it, and the boundaries of [the] delegated authority" *American Power & Light Co.* v. *SEC*,

329 U.S. at 105. When Congress legislates in that manner, the Executive Branch is able "to understand the[] limits" of the law, *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574 (1939), and the Judicial Branch, when presented with a case challenging Executive action, is able "to ascertain whether the will of Congress has been obeyed," *Yakus* v. *United States*, 321 U.S. 414, 426 (1944). Hence, it has long been recognized that Congress may call upon the Executive Branch to implement congressional policies by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935)). Accord, *e.g.*, *The Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1813); *Field* v. *Clark*, 143 U.S. 649, 683 (1892); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Erie R.R.* v. *Board of Public Utility Comm'rs*, 254 U.S. 394, 413 (1921).

This Court has repeatedly rejected claims that particular acts of Congress have unconstitutionally delegated legislative power to the Executive. The only notable exception occurred in 1935, when the Court in two cases struck down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan, supra.*[4] The invalidated provisions called for the creation of codes of fair competition for the entire economy, bypassed the normal administrative process, and "supplie[d] no standards for any trade, industry or activity" (*A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541). The law created what Justice Cardozo described as "a roving commission to inquire into evils and upon discovery correct them" (*id.* at 551 (concurring opinion)). As such, Justice Cardozo called the challenged law "delegation running riot" (*id.* at 533).

In the 53 years since *Schechter Poultry* was decided, however, the Court has repeatedly and uniformly upheld statutes challenged on non-delegation grounds. See, *e.g.*, *FEA* v. *Algonquin*

[4] See also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 310-311 (1936) (holding unconstitutional a similar provision of the Bituminous Coal Conservation Act of 1935 that delegated the power to set wages and hours of production to a non-governmental body).

SNG, Inc., 426 U.S. 548, 559 (1976); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Lichter* v. *United States*, 334 U.S. 742 (1948); *Yakus* v. *United States, supra*; *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Currin* v. *Wallace*, 306 U.S. 1 (1939). Section 7005 of COBRA falls squarely within this tradition. It sets forth Congress's policy determination, and calls upon the Executive to implement that policy by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. at 421).

II. *Congress's Power To Tax Is Not Subject To Greater Restrictions On Delegation Than Its Other Article I Powers*

Appellee does not seriously contend that Section 7005 is less precise or that it gives the Executive more open-ended authority over a larger field of regulation than the many statutes that this Court has upheld against non-delegation claims. Rather, appellee maintains (Mot. to Aff. 5-17) that Section 7005 is different because it authorizes the imposition of a tax, and only Congress may make choices involving taxation.[5] Appellee's claim is wrong; neither the language or the history of the Constitution, nor settled practice, nor this Court's decisions sup-

[5] The length of the Internal Revenue Code (Title 26) suggests that Congress often legislates with considerable precision in the area of taxation. But Congress has also chosen to give the Executive significant discretionary authority in executing Congress's tax policies. See generally *Bob Jones University* v. *United States*, 461 U.S. 574, 596-597 (1983). For example, Congress has given the Secretary of the Treasury broad authority to prescribe "all needful rules and regulations for the enforcement of this Title," including the authority to determine whether such rules should be given "retroactive effect." 26 U.S.C. 7805(a), (b). Congress has also directed the Secretary to prescribe regulations for the filing of consolidated tax returns "in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability * * *" (26 U.S.C. 1502). And to ensure proper collection of the Windfall Profit Tax on oil companies, Congress has instructed the Secretary of the Treasury to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter" (26 U.S.C. 4997).

port the proposition that Congress's power to tax is subject to greater restriction on delegation than are its other legislative powers.

A. The language of the Constitution does not support appellee's claim. Article I, Section 8, of the Constitution sets forth the many powers of Congress. One of those powers is the "Power To lay and collect Taxes." Article I, however, does not distinguish the taxing power from any of the other enumerated powers (*e.g.*, the power to borrow money or to regulate commerce) in terms of the extent to which Congress may call upon the Executive to exercise discretion in carrying out congressional policies. Thus, there is no textual basis for concluding that Congress may give the Executive authority to make subsidiary rules governing such matters as maximum prices (see *Sunshine Anthracite Coal Co.* v. *Adkins, supra*) or unfair competition (see *FTC* v. *Keppel & Bro.*, 291 U.S. 304 (1934)), but not taxes. This Court recognized that point in *Lichter* v. *United States*, when it stated that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes" (334 U.S. at 778-779 (emphasis omitted)). Accord *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988) (rejecting claim that Congress's power to set rules relating to taxation is non-delegable), cert. pending, No. 88-234; *Synar* v. *United States*, 626 F. Supp. 1374, 1385 (D.D.C.) (Scalia, Johnson, Gasch, J.J.) (per curiam) (rejecting contention that there are "core functions" that Congress may not delegate to the Executive), aff'd on other grounds, 478 U.S. 714 (1986).

Nor does the language of Article II of the Constitution forbid the Executive to make discretionary judgments when executing tax laws. Article II, Section 3, broadly provides that the President "shall take Care that the Laws be faithfully executed." It does not say, as appellee's argument necessarily implies, that the President and his officers may use their discretion when executing all laws except those that raise money. In sum, the constitutional rule that appellee posits—*i.e.*, that Congress must legislate with unusual specificity in the tax areas—is surely not found in the language of the Constitution.

B. Appellee nevertheless contends (Mot. to Aff. 10-12) that its claim is supported by concerns expressed by the Framers of the Constitution. Indeed, there was a sharp debate at the constitutional convention and during the ratification process about the federal government's power to tax. But that debate and its outcome have little to do with the question posed by appellee—whether Congress may pass laws that call upon the Executive to implement Congress's policy by adopting subordinate rules.

The principal debate over taxes at the constitutional convention was whether the federal government should have any power to levy taxes at all. George Mason argued that the federal government should not be given that power because the "unconditional power of taxation * * * cannot but oppresss the people." 2 P. Kurland & R. Lerner, *The Founders' Constitution* 438 (1987). He contended that the federal government should rely on the states to raise taxes, which could then be requisitioned by the federal government, because the states "are acquainted with the[] condition and circumstances" of the people (*ibid.*). James Madison strongly disagreed. Madison stated: "I trust we shall find that part [of the Constitution] which gives the general government the power of laying and collecting taxes indispensable, and essential to the existence of any efficient or well-organized system of government" (*id.* at 436). Madison's view, of course, prevailed at the convention and during the ratification process. See generally 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 467 (2d ed. 1836) (statement of James Wilson at the Pennsylvania Ratifying Convention) ("Congress should possess the power of raising revenues from their constituents"). As a result, the enumerated powers of Congress in Section 8 of Article I of the Constitution include the power to tax.

We are aware of no debate at the constitutional convention that addressed the issue of how precisely Congress must legislate when it passes a tax statute. There is simply no evidence that the Framers believed the Taxing Clause in Article I imposed special

requirements of specificity on Congress.[6] Indeed, an opponent of the proposed Constitution clearly understood that a tax law, like other acts of Congress, might call upon the Executive to use its discretion in executing the statute. This anti-federalist wrote:

> The general legislature will be empowered to lay any tax they chuse, to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes. They will have authority to farm the revenues and *to vest the farmer general, with his subalterns, with plenary powers to collect them, in any way which to them may appear eligible.*

P. Kurland & R. Lerner, *supra*, at 418 (reprinting *Brutus*, No. 6) (emphasis added)).

At bottom, appellee is arguing that the drafters of the Taxing Clause intended to include in that provision an implicit limitation not found in the other enumerated powers of Congress—that Congress may enact a law that raises revenue *only if* that law gives the Executive no (or perhaps only very little) discretion in its implementation. But Hamilton noted at the convention that "the national government should possess an *unrestrained* power of taxation" (P. Kurland & R. Lerner, *supra*, at 422 (emphasis added)). And Justice Chase in his opinion for this Court in 1796 noted that "[t]he great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government." *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 173 (1796). Thus, appellee is wrong in asserting that the Framers must have silently meant to limit

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[6] Appellee cites (Mot. to Aff. 11 n.9) Madison's comment that "[t]he legislative department alone has access to the pockets of the people" (The Federalist No. 48, at 310 (C. Rossiter ed. 1961)). That is undoubtedly correct, but it only means that Congress must pass tax laws; the President and Article III judges cannot create taxes on their own. Madison's comment, however, has nothing to do with this case. Congress duly enacted Section 7005; the Secretary of DOT did not act independently. The only issue here is whether Congress made Section 7005 precise enough to satisfy the Constitution's principle of the separation of powers.

Congress's Article I power "To lay and collect Taxes" in a manner not applicable to other Article I powers, such as the powers "To borrow Money" and "To regulate Commerce." See generally 2 J. Story, *Commentaries on the Constitution of the United States* § 920 (2d ed. 1851) (the Constitution "gives the power to tax, as a substantive power; and gives others, as equally substantive and independent").[7]

C. The practice of early Congresses further confirms that Congress may rely upon the Executive to make choices when implementing tax laws. See generally *Field* v. *Clark*, 143 U.S. 649, 683 (1892) (long practice of Congress in delegating authority to the President "is entitled to great weight"). The First Congress imposed duties on certain distilled beverages and set down penalties for failing to pay the required taxes. See Act of March 3, 1791, ch. 15, 1 Stat. 199. In that law, Congress gave "the secretary of the treasury of the United States" the "power to mitigate or remit such penalty or forfeiture * * * upon such terms and conditions as shall appear to him reasonable" (*id.*, § 43, 1 Stat. 209). The Third Congress authorized the President "to form and erect [taxing] districts * * * as from time to time shall appear, in his judgment, expedient and necessary" to collect taxes on distilled spirits (Act of June 5, 1794, ch. 49, § 1, 1 Stat. 378). And perhaps most instructive is a law passed by the Fifth Congress in 1797. That Congress passed a law (Act of July 6, 1797, ch. 11, 1 Stat. 527) levying stamp duties on certain

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[7] Appellee notes (Mot. to Aff. 10-12) the requirement in the Constitution that all bills "raising Revenue" originate in the House of Representatives (Art. I, § 7, Cl. 1). Contrary to appellee's suggestion, however, that provision does not state that the resulting law may not confer upon the Executive Branch the same degree of discretionary authority as other statutes not raising revenues. The Origination Clause is simply silent on the topic of delegation of authority. Nor does the broad purpose behind the Origination Clause support appellee's argument; if anything, the opposite is true. The Framers apparently included the Origination Clause in the Constitution because they thought that the House of Representatives would "possess more ample means of local information" (2 J. Story, *supra*, § 873). Today, in a much more complex society, Congress could rationally conclude that only by conferring broad authority on the Executive to investigative conditions in particular industries would sufficient "local information" be generated to allow satisfactory fee schedules to be fixed.

types of bank papers. Congress, however, authorized the Secretary of the Treasury, in lieu of collecting the stamp duty, "to agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of annual dividend made by such banks" (§ 2, 1 Stat. 528).

In short, the early Congresses passed tax measures that called upon the Executive Branch to make "reasonable" judgments, to do what was "expedient and necessary," and to make choices concerning the measure of a taxpayer's liability. Those early enactments provide " 'contemporaneous and weighty evidence of the Constitution's meaning' " since many Members of the early Congresses " 'had taken part in framing that instrument' " (*Bowsher* v. *Synar*, 478 U.S. at 723-724, quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)).

D. Appellee chiefly relies (Mot. to Aff. 5-10) on *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), in arguing that Congress's power to tax carries with it special rules of non-delegation. Appellee's heavy reliance on *National Cable Television Ass'n*, however, is misplaced. In fact, this Court's decisions confirm what is plain from the text, history, and practice of the Constitution—that Congress's power to enact tax laws is no different for non-delegation purposes from its other Article I powers.

In *J.W. Hampton Jr., & Co.* v. *United States, supra,* the Court considered a challenge to a statute giving the Executive broad authority to set tariffs (a type of tax) on imported goods. The Court rejected the argument, also advanced by appellee here, that Congress may not "use executive officers in the application and enforcement of a policy declared in law by Congress * * * where Congress has exercised the power to levy taxes and fix customs duties" (249 U.S. at 409). The Court stated (*ibid.* (emphasis added)):

> The *same principle* that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in

> accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Thus, *J. W. Hampton* expressly rejected a hierarchy of authority among Congress's Article I powers for purposes of the non-delegation doctrine.

Appellee nevertheless contends that this Court's decision in *National Cable Television Ass'n* v. *United States, supra,* adopted a stricter standard for delegation under the taxing power than applies to the exercise of other congressional powers. Although there is language in *National Cable Television* that, if taken out of context, can be read to support that contention, a careful reading of the opinion reveals that the Court was not drawing any distinction between the power of taxation and other sources of congressional authority. In *National Cable Television Ass'n,* the Court considered the power of federal agencies to assess fees under the Independent Offices Appropriation Act (IOAA), 1952, 31 U.S.C. 9701. The IOAA allows agencies to collect fees that are measured by "the value * * * to the recipient" of the agency's service, and it also permits agencies to consider the "public policy or interest served; and other relevant facts." 31 U.S.C. 9701(b)(2)(B), (C) and (D). In considering fees set by the Federal Communications Commission under the IOAA, the Court observed that "[t]axation is a legislative function," and that Congress "is the sole organ for levying taxes" (415 U.S. at 340). The Court also distinguished between "taxes" and "fees," and noted that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power" (*id.* at 340-341). But those statements—which are surely correct—simply mean that the Executive may not collect taxes without congressional approval. They say nothing about whether Congress may rely on the Executive to use its discretion in implementing Congress's tax laws.

The Court next went on to discuss the separation-of-powers principle of *Schechter Poultry* and *J. W. Hampton* and concluded: "Whether the present Act meets the requirement of

Schechter and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems" (*id.* at 342). Then, in order to avoid the constitutional difficulties that an expansive reading of the IOAA might present under *Schechter Poultry* and *J.W. Hampton*—which of course set forth the *general* standards for non-delegation of congressional power—the Court read the Act to permit the Federal Communications Commission to set fee amounts based on the "value to the recipient" of the Commission's services, but not to allow fees to be set on the basis of the "protective services rendered the public" in general (*id.* at 341). Accordingly, *National Cable Television Ass'n* stands for only the proposition (415 U.S. at 342) that a law that confers discretion on the Executive in matters related to raising revenue, like any other statute challenged on non-delegation grounds, is constitutional if it satisfies the principles announced in *Schechter Poultry* and *J.W. Hampton*. See *Florida Power & Light Co.*, 846 F.2d at 772-775.[8]

Later decisions make clear that the Court in *National Cable Television Ass'n* did not intend to establish a new and more restrictive non-delegation doctrine for tax cases. In *FEA* v. *Algonguin SNG, Inc., supra,* decided one year after *National Cable Television Ass'n,* the Court considered a non-delegation challenge to the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, which allowed the President to raise license fees on imports when he found that such action was needed to

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[8] Thus, we agree with the following observation of two commentators:

> Justice Douglas's opinion in *National Cable Television* does state that Congress is "the sole organ for levying taxes," but there is little reason to believe that congressional monopoly over taxation prevents its delegation, properly constrained by safeguards and standards, any more than congressional autonomy over interstate commerce precludes delegation of that power. What Justice Douglas appears to have been suggesting is that in the case of the IOAA there is no evidence that Congress *had* delegated the taxation power.

Gillette & Hopkins, *Federal User Fees: A Legal and Economic Analysis,* 67 B.U.L. Rev. 795, 823 (1987).

protect the national security. The Court, applying the traditional non-delegation test of *J.W. Hampton,* upheld that Act giving discretionary authority to the President in the area of taxation. Without even suggesting that Congress's power of taxation is subject to special requirements of specificity, the Court explained its prior decision in *National Cable Television Ass'n* this way:

> In *National Cable Television,* we held that the fees to be imposed [under the IOAA] should be measured by "the value to the recipient" even though the language of the general statute * * * permits consideration * * * also of "public policy or interest served, and other pertinent facts." The Court's conclusion that the words of the last-quoted phrase were not relevant * * * was apparently motivated by a desire to avoid any delegation doctrine problem that might have been presented by a contrary conclusion. But what might be considered the open-ended nature of the phrase "public policy or interest served, and other pertinent facts" stands in contrast to [the Trade Expansion Act's] more limited authorization of the President to act only to the extent necessary to eliminate a threat of impairment to the national security * * *.

426 U.S. at 560 n.10. *Algonguin SNG* thus confirms that the Court in *National Cable Television Ass'n* interpreted the IOAA narrowly,[9] not because the statute was enacted under Congress's Article I taxing power, but because of the "open ended nature of the phrase 'public policy or interest served, and other pertinent facts' " (*ibid.*).[10]

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[9] In this case, there is no question of statutory interpretation. Appellee does not contend that the Secretary's fee schedule is contrary to congressional intent as expressed in Section 7005 of COBRA.

[10] If *National Cable Television Ass'n* were read as imposing a stricter standard for the delegation of authority in the field of taxation, but not an absolute bar, then this Court would have to create a new non-delegation standard for Congress's taxing power. No such stricter, yet workable, standard easily comes to mind. Before the Magistrate, appellee argued that Congress must make all "fundamental" choices (J.A. 10). That standard, however, appears to be no different from the traditional tests of *American Power and Light* and *J.W.*

More recently, in *Bob Jones University* v. *United States,* 461 U.S. 574 (1983), the Court considered the contention that only Congress, rather than the Internal Revenue Service, has the power to change an established interpretation of the general provisions of the Internal Revenue Code. The Court rejected that claim in emphatic terms (*id.* at 596-597):

> [E]ver since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as a tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. * * * Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will.

E. The major premise of appellee's entire argument is that we would have a more representative and responsible government if Congress approved all, or virtually all, governing legal norms that affect the people of this country. Whatever the merits of that contention, it was not the theory of government adopted by the Constitution. Prior to the Constitution, Locke observed that the "Assemblies of the Legislative" could not "answer all the Exigencies of the Commonwealth;" consequently, "the best remedy * * * was to trust this to the prudence of one [the Executive], who was always to be present, and whose business it was to watch over the public good" (J. Locke, *Second Treatise* § 156 (1689)). The Framers of our Constitution agreed, and created an independent Executive whose job is to execute the laws of Congress. Moreover, they made the President "a representative of the people just as the members of the

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Hampton, which require Congress to set forth its general policy, the boundaries of the delegated authority, and intelligible principles to which the Executive must conform. The difficulty in articulating and applying a stricter standard in the tax area is further evidence that the Constitution does not require such a standard.

Senate and of the House are." *Myers* v. *United States,* 272 U.S. 52, 123 (1926).

The Constitution makes Congress the supreme lawmaker, but with that grant of power comes the authority to ask for assistance from the coordinate branches of government. As the Court noted in *Panama Refining Co.,* 293 U.S. at 421:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to subordinate instrumentalities the making of subordinate rules within prescribed limits * * *. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

When the Congress asks for help from the Executive Branch, the "Executive action is always subject to check by the terms of the legislation that authorized it." *INS* v. *Chadha,* 462 U.S. at 953 n.16. And Congress may investigate the manner in which its laws are being executed, determine whether congressional policy is being fulfilled, and modify its legislation if necessary. See W. Gwyn, *The Meaning of Separation of Powers* 102 (1965) (Congress is uniquely able "to examine in what manner the laws that it has made have been executed"). The principle of separation of powers has little or nothing to say about a decision by Congress to delegate some discretionary authority to the Executive, all the time retaining the power, through the enactment of legislation, to reverse specific Executive action and even to recall the Executive's power to act.

Congress made the basic political choices in this case. Congress decided that there should be federal programs to ensure pipeline safety. Each year, Congress decides how much those

programs will cost. And in Section 7005 of COBRA, Congress decided who would pay for the programs – pipeline operators. This is not a case, as appellee contends (Mot. to Aff. 11), where "the taxing power" was kept out of "the hands of a representative body." The basic political battle was fought in Congress, and pipeline operators clearly lost. See generally *INS* v. *Chadha,* 462 U.S. at 966 (Powell, J., concurring in judgment) "Congress is most accountable politically when it prescribes rules of general applicability."). There is no reason to suppose that the fee scheme would be more rational or equitable if Congress were required to make every choice. See generally Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 1 (1985).

III. ***The Fees Collected Under Section 7005 Are Not Taxes***

For the reasons set forth above, we believe that the Constitution draws no distinction between the taxing power and other Article I powers for purposes of the non-delegation doctrine. But even if it does, we do not believe that Section 7005 of COBRA should be categorized as imposing a "tax" in the constitutional sense. That section is designed to recover the government's costs that are incurred in regulating the safety of pipelines under programs that have been adopted pursuant to Congress's power to regulate interstate commerce. A law that requires a party to reimburse the government for costs associated with a program of regulation made necessary by that party's activities is, for constitutional purposes, properly regarded as imposing a "fee" rather than a "tax." That is clear from this Court's cases.

A. In the *Head Money Cases,* 112 U.S. 580 (1884), the Court considered the constitutionality of a statute requiring ship owners to pay a duty of 50 cents for every non-citizen that they transported to the United States. The money was used to pay the costs of administering the immigration laws. The Court, in rejecting a challenge to the law as an unconstitutional tax, noted

that "the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration" (*id.* at 595). In other words, the Court recognized that for constitutional purposes, a fee (as distinguished from a tax) may include exactions imposed on a party engaged in a particular activity in order to recover the costs imposed by that activity on the government. A tax, in contradistinction, is an exaction designed not to recover specific costs associated with a party's activities, but to raise revenue for the general support of the government. As the Court explained (*id.* at 595-596):

> The sum demanded of [the ship owner] is not * * * a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed.

The Court applied the same principle in *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935). In that case, a ship owner challenged a state rule imposing harbor fees for ships entering the Port of Mobile. The fees were used to police the harbor and to insure the safety of vessels in the harbor (*id.* at 263). The ship owner contended that the fees violated the Constitution's prohibition against tonnage duties (Art. I, § 10, Cl. 2), which forbids "all taxes and duties regardless of their name or form, * * * which operate to impose a charge for the privilege of entering, trading in, or lying in a port" (296 U.S. at 265-266). In rejecting that contention, the Court noted that the fees were used to fund government services that "are plainly devised to insure the safety of vessels and to

facilitate their use of the harbor" (*id.* at 264). As such, the Court found the fees were not taxes but exactions "for services rendered to and enjoyed by the vessel[s]" (*id.* at 266). Moreover, the Court found it irrelevant that the ship owner "neither asked for nor received any police service such as that which the state * * * regarded as the basis for the charge" (*ibid.*)[11] The Court concluded (*ibid.*):

> It is not any less a service beneficial to [the ship owner] because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it.

The lesson of the *Head Money Cases* and *Clyde Mallory Lines* is that the government is not imposing a "tax," in the strict sense used by the Constitution, when it requires an entity to pay the costs of a government program made necessary by that entity's commercial activities.[12] Such a fee is properly viewed as one of the costs of doing business. Here, appellee is in the business of transporting hazardous liquids through pipelines. That activity entails certain social costs, including the dangers to employees and the public from pipeline leaks, spills, and explosions. Congress has enacted the Hazardous Liquid Pipeline Safety Act in an effort to minimize those social costs, and has rationally determined that appellee should reimburse the government for its expenses of administering that program. See H.R. Rep. 99-300, 99th Cong., 1st Sess. 494 (1985) (quoting with approval testimony that "it is equitable for interstate pipeline operators and their customers to finance DOT's safety inspections, because the risks that these inspections reduce are entirely created by the pipeline operations"). Accordingly, Section 7005 is an exercise of Congress's "regulation of commerce"

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[11] Appellee has made a strikingly similar claim in this case (Mot. to Aff. 16)—"Mid-America has requested no service from DOT in exchange for which Section 7005 assessments are being charged."

[12] The Court applied the same general principle in an analogous context in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), when it held that fees imposed on state aircraft to recover the costs of federal aviation programs do not violate the constitutional rule of state immunity from federal taxation.

(*Head Money Cases,* 112 U.S. at 595). The fees collected under Section 7005 do "not go to the general support of the government (*id.* at 596); they go "to a special account at the U.S. Treasury" (J.A. 40) to be used solely to pay for the costs of the pipeline safety programs.

Appellee, again relying on *National Cable Television Ass'n,* argues (Mot. to Aff. 15-16) that an exaction is a tax unless the money is collected by the government in exchange for a "benefit * * * not shared by other members of society" (415 U.S. at 341). However, this Court's insistence in that case on receipt of a "benefit" can be explained by the language of the IOAA, which then authorized the imposition of fees only for "any work, service, * * * benefit, * * * license, * * * or similar thing of value or utility performed, furnished, provided, [or] granted by any Federal agency" (415 U.S. at 337 (quoting IOAA)). In any event, the language in *National Cable Television Ass'n* can be reconciled wtih the *Head Money Cases* and *Clyde Mallory Lines,* provided the word "benefit" is given a sufficiently broad meaning. In fact, the Court in *National Cable Television Ass'n* noted that the issuance of a license by a regulatory body may qualify as a "benefit." See 415 U.S. at 340. Thus, even under appellee's reading of *National Cable Television Ass'n,* Congress could plainly adopt the following scheme without exercising its taxing power: Congress could (a) make the transportation of hazardous liquids and gases through pipelines illegal without obtaining a license from DOT, (b) require DOT to establish a safety program designed, among other things, to ensure that all licensees comply with safety rules, and (c) authorize DOT to impose license fees on all licensees to pay the costs of administering the safety programs. The scheme that Congress has chosen differs from the one posited only in that it is more efficient because it eliminates the administrative costs associated with seeking and awarding licenses. The non-delegation doctrine, which is designed to ensure responsible government, certainly does not require Congress to create layers of laws to reach a result that may be obtained directly.

Moreover, pipeline operators clearly *do* receive direct and specific benefits from the government's safety programs; the

safety of their facilities is improved and their risk of being held liable for accidents is reduced. As the Court noted in *Clyde Mallory Lines,* "[t]he benefits which flow from the [government's safety programs] inure to all" who engage in the enterprise (296 U.S. at 266). Pipeline operators may believe that the costs under Section 7005 do not match the benefits that they receive, but that does not take away from the fact that pipeline operators receive a benefit.

B. There are many examples of fees imposed by the federal government similar to those required by Section 7005 that no one has even suggested are "taxes." The United States Customs Service charges fees for processing imported merchandise (19 C.F.R. 24.23). The Commodity Futures Trading Commission charges a fee to review a new futures contract (7 U.S.C. 16a). And the Environmental Protection Agency charges large fees to establish, raise, or lower tolerance levels for pesticides (40 C.F.R. Pt. 180). In all those cases, we do not consider the fees to be "taxes," even though importers might prefer to bring their goods into the United States without inspection, and manufacturers of pesticides might prefer to have no government regulation of pesticides. And in all those cases, we do not ask if the private benefits from the government programs are equal to the amount of the fees charged. Rather, we know that the exactions are fees (not taxes) because the private activity imposes direct costs on the government and the purpose of the exaction is to reimburse the government for those costs. The government is not requiring the private party to bear the general costs of government—*i.e.,* to subsidize the cost of unrelated programs. The government is simply requiring the private party to pay for the costs of the government services that they create. Accordingly, Section 7005 of COBRA does not establish a "tax" in the constitutional sense and thus does not—even under appellant's view of the non-delegation doctrine—call for strict scrutiny of the statute.

IV. *Section 7005 Is Constitutional When Measured Against The Established Standards For Determining Whether There Has Been An Excessive Delegation Of Legislative Power*

A. Section 7005 of COBRA is sufficiently precise to satisfy the established test for judging whether Congress's grant of discretionary authority to the Executive is excessive—*i.e.*, whether Congress "delineate[d] the general policy, the public agency which is to apply it, and the boundaries of [the] delegated authority" *American Power & Light Co.*, 329 U.S. at 105. Section 7005 plainly sets out Congress's policy and the component of the Executive Branch that is to implement that policy. Section 7005 directs, not merely allows, the Secretary of Transportation to assess and collect fees to cover the costs of administering the Hazardous Liquid Pipeline Safety Act and the Natural Gas Pipeline Safety Act. It requires that those fees be collected from certain persons operating facilities subject to the two pipeline safety statutes.[13] The Secretary is instructed to collect funds "sufficient to meet the costs of [the] activities" of the two programs as established by annual appropriations (§ 7005(d), 100 Stat. 141); thus Congress sets the total amount of fees to be collected each year. Nor does the Secretary exercise unbridled discretion in setting the amount of fees that each company must pay. Rather, the statute sets forth the *exclusive* factors that the Secretary may consider in creating the schedule—"volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines" (COBRA § 7005(a)(1)). And the statute requires the Secretary to create a fee schedule that is "reasonable" on the basis of those factors. See H.R. Rep. 99-300, *supra*, at 497 ("This subsection specifies that the formula must be 'reasonable.' ").

The statute also imposes a number of constraints on the Secretary. The Secretary may not collect fees that exceed 105% of Congress's annual appropriations for the pipeline safety programs. He may not collect fees from persons who are not sub-

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[13] Not all regulated entities are liable for fees; the statute does not authorize the Secretary to collect fees from operators of gas distribution facilities.

ject to either of the two safety Acts. He may not use the funds for purposes other than administering the two Acts. He may not set fees on a case-by-case basis,[14] and he may not consider any factors other than the three criteria set forth in the statute. Hence, Section 7005 clearly sets forth "an intelligible principle to which the [Executive] * * * is directed to conform" (*J.W. Hampton & Co.*, 276 U.S. at 409). This is not a statute that suffers from "an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus*, 321 U.S. at 426).

Nor is Section 7005 invalid merely because Congress did not itself establish detailed fee schedules. In *United States* v. *Rock Royal Co-Operative, supra,* the Court upheld a statute authorizing the Secretary of Agriculture to set milk prices. The court noted that Congress did not give the Secretary of Agriculture a "mathematical formula" but, rather, prescribed "the various factors to be considered by the Secretary" (307 U.S. at 577). Likewise, Congress in this case did not attempt to eliminate the Secretary's discretion entirely by legislating a specific formula; it reasonably set out the factors that the Secretary may consider in executing Congress's policy and left to "administrative judgment * * * the relative weights to be given to these factors." *Opp Cotton Mills, Inc.* v. *Administrator Wage and Hour Div.*, 312 U.S. 126, 145 (1941) (upholding statute authorizing Executive Branch to fix minimum wages).

The Magistrate concluded (J.S. App. 10a) and appellee argues (Mot. to Aff. 17-18) that Section 7005 is unconstitutional because the Secretary has discretion to select among three different statutory criteria in establishing a schedule of fees. But the Magistrate ignored the many limits that Congress placed on the Secretary before he may exercise some discretion in establishing a fee schedule that, in light of his experience in administering the two safety Acts, is reasonable. Whenever Congress

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[14] The Magistrate clearly erred when he said that "the Secretary is given the power to *set* tax brackets or rates for *individual* pipeline companies" (J.S. App. 10a (second emphasis added)).

passes a statute conferring a measure of discretion on the Executive, at some level the agency charged with implementing the statute must exercise judgment in carrying out Congress's policy. But that fact does not give rise to a constitutional problem. As the Court noted in *Yakus,* 321 U.S. at 425-426, Congress "is not confined to that method of executing its policy which involves that least possible delegation of discretion to administrative officers." So long as the statute meets the standards set forth in *American Power & Light Co.* and *J.W. Hampton,* the Constitution's requirement of separation of powers is satisfied.

B. The validity of Section 7005 becomes even more evident when that provision is compared to other statutes that the Court has sustained against non-delegation challenges. The Court has upheld statutes authorizing the Executive to recover excessive profits earned on military contracts (*Lichter* v. *United States,* 334 U.S. at 785-786), to set maximum prices that are generally fair and equitable (*Yakus*, 321 U.S. at 427), to set just and reasonable rates for natural gas (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944)), to license radio communications as public interest, convenience, or necessity requires (*National Broadcasting Co.* v. *United States,* 319 U.S. at 225-226), to prohibit unfair methods of competition (*FTC* v. *R.F. Keppel & Bro.*, 291 U.S. at 310), and to approve consolidation of carriers when in the public interest (*New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24 (1932)). When compared to those statutory provisions, the Executive authority created under Section 7005 is very modest indeed—and clearly constitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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QUESTION PRESENTED

May Congress constitutionally assign to the Secretary of Transportation the power to select tax rates to finance Department of Transportation regulatory programs.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
A. The Statute And Its Application	1
B. The Proceedings Below	4
SUMMARY OF ARGUMENT	6
ARGUMENT	9
CONGRESS MAY NOT ASSIGN THE TAXING POWER TO THE DEPARTMENT OF TRANSPORTATION	9
I. Constitutional Restraints On Exercise Of The Taxing Power Are Deeply Rooted In Our Heritage	10
A. The Origination Clause And Its Historical Foundations	10
B. Historically, The Careful Delineation Between The Roles Of The Legislative And Executive Branches In Matters Of Taxation Has Always Been Respected	16
1. Congress Has Always Set Tax Rates	16
2. Decisions Of This Court Have Maintained The Division Between The Legislative And Executive Roles In Matters Of Taxation	19
II. The Method Of Making Tax Law Under Section 7005 Contravenes The Origination Clause And Eliminates Legislative Accountability For Taxing Decisions	21

TABLE OF CONTENTS—Continued

	Page
A. The Process Of Making Tax Law Described By Section 7005 Is Not The Process That The Constitution Requires	22
B. This Court's Decisions Reflect An Insistence That Congress Make Tax Law In A Manner Consistent With The Constitutional Plan	27
III. The Exercise Of Tax-Setting Authority Authorized By Section 7005 Cannot Fairly Be Characterized As An Executive Function	35
A. Allocating Tax Burdens Is Peculiarly Within The Competence Of The Legislative Branch And Beyond The Competence Of The Executive Branch	38
B. Under Section 7005, The Secretary Has Been Directed To Make A Law And "Faithfully Executes" Nothing	43
C. Section 7005 Impermissibly Assigns The Decision How To Allocate The Tax Burden To Executive Officials	46
CONCLUSION	49

TABLE OF AUTHORITIES

Cases: **Page**

Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), *aff'd*, 831 F.2d 1043 (Fed. Cir. 1987) 28
Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979) .. 28
American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 47
Bowsher v. Synar, 478 U.S. 714 (1986) 8, 27, 37, 46
The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) 38
Buckley v. Valeo, 424 U.S. 1 (1976) 7, 23
Buttfield v. Stranahan, 192 U.S. 470 (1904) 38
Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985) 20, 28
City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) 28
Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n, 296 U.S. 261 (1935) 34
Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 32, 38
Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974) .... *passim*
Field v. Clark, 143 U.S. 649 (1892) 7, 32, 36, 37, 38, 47
Florida Power & Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988) 21, 30
Head Money Cases, 112 U.S. 580 (1884) 31, 32, 33, 34
Helvering v. Sabine Transp. Co., 318 U.S. 306 (1943) 19
Humphrey's Executor v. United States, 295 U.S. 602 (1935) 36
Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 44
INS v. Chadha, 462 U.S. 919 (1983) 7, 22, 23, 24, 27, 36, 45
J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928) .... *passim*
Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969) 19

TABLE OF AUTHORITIES—Continued

Page

Lichter v. United States, 334 U.S. 742 (1948) 7, 38, 40, 41, 47
Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129 (1936) 19
Massachusetts v. United States, 435 U.S. 444 (1978) 34
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 15
Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) 21, 28, 29
National Ass'n of Broadcasters v. Federal Communications Comm'n, 554 F.2d 1118 (D.C. Cir. 1976) 21
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) ....*passim*
Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) 21, 28, 29
New England Power Co. v. U.S. Nuclear Regulatory Comm'n, 683 F.2d 12 (1st Cir. 1982).......... 21, 28
Phillips Petroleum Co. v. FERC, 786 F.2d 370 (10th Cir.), *cert. denied*, 479 U.S. 823 (1986).... 28
Sohio Transp. Co. v. United States, 766 F.2d 499 (Fed. Cir. 1985) 20, 28
Spencer v. Merchant, 125 U.S. 345 (1888) 15
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 47
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)..........33, 38, 40
United States v. Empey, 406 F.2d 157 (10th Cir. 1969) 19
United States v. Grimaud, 220 U.S. 506 (1911) 47
United States v. Mazurie, 419 U.S. 544 (1975) 38
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 41
Wright v. Nagle, 101 U.S. 791 (1879) 36
Yakus v. United States, 321 U.S. 414 (1944)........ 47
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 7, 45, 49
Zemel v. Rusk, 381 U.S. 1 (1965) 38

TABLE OF AUTHORITIES—Continued

Constitution and Statutes: Page

U.S. Const.:

Art. I ... *passim*

§ 2 ... 22
§ 7 ... *passim*
§ 8 ... 22, 42

Act of July 4, 1789, ch. 2, 1 Stat. 24 ... 16
Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 ... 16
Act of March 3, 1791, ch. 15, 1 Stat. 199 ... 17
Act of June 5, 1794, ch. 48, 1 Stat. 378 ... 17
Act of July 6, 1797, ch. 11, 1 Stat. 527 ... 17
Airport and Airway Development and Revenue Acts of 1970, Pub. L. No. 91-258, 84 Stat. 219 ... 34
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 ... 1

§ 7005 ... *passim*
§ 7601 ... 2, 30

Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001 *et seq.* ... 2
Independent Offices Appropriation Act, 1952, 31 U.S.C. § 9701 ... *passim*
Internal Revenue Code (26 U.S.C.):

§ 1502 ... 19
§ 7805 ... 18

Natural Gas Pipeline Safety Act of 1968, 40 U.S.C. App. (& Supp. III) § 1671 *et seq.* ... 2
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890 ... 2, 48

Legislative History:

H.R. Rep. No. 300, 99th Cong., 1st Sess. 492 (1985) ... 3, 29, 30
H.R. 2266, 100th Cong., 2nd Sess. § 301 (1988) ... 5, 6
134 Cong. Rec. H1670 (April 19, 1988) ... 6

Other Authorities: Page

Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982) 44
W. Blackstone, *Commentaries* (1765) 10
J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1896) 12, 13, 14, 35
J. Ely, *Democracy and Distrust* (1980) 24, 44
The Federalist No. 10 (Hamilton) 12
The Federalist No. 58 (Madison) 15
E.J. Ferguson, *The Power of the Purse* (1961) 10
D. Forsythe, *Taxation and Political Change in the Young Nation* (1977) 16
Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307 (1976) 39, 42, 44
J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978) 39
Internal Revenue Service, Statement of Principles, Rev. Proc. 64-22, 1964-1 CB 689 18
A.H. Kelly & W.A. Harbison, *The American Constitution* (1948) 11
P.B. Kurland & R. Lerner, *The Founders' Constitution* (1987) 11
T. Lowi, *The End of Liberalism* (2nd ed. 1979) 44
Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81 (1985) 44
McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119 (1977) 44
Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985) 44
J. Schouler, *Constitutional Studies: State and Federal* (1971) 11, 12
Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and the Delegation of Power*, 72 Nw. U. L. Rev. 443 (1978) 44

TABLE OF AUTHORITIES—Continued

Page

J. Story, *Commentaries on the Constitution of the United States* (DeCapo ed. 1970) 10

F.N. Thorpe, *The Constitutional History of the United States* (1970) 10

L. Tribe, *American Constitutional Law* (2nd ed. 1988) 41, 44

D.K. Watson, *The Constitution of the United States* (1910) 35

Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575 (1972) 44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,
v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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BRIEF FOR APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by the Government (Gov't Br. at 2-3), Article I, Section 7, Clause 1 of the Constitution (the "Origination Clause") provides: "All Bills for raising Revenue shall originate in the House of Representatives . . . ."

STATEMENT

A. The Statute And Its Application

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 140-41, instructs the Secretary of Transportation to raise revenue sufficient to finance the Department of Transportation's ("DOT" or the "Depart-

ment") pipeline regulatory programs.[1] The costs to be recovered comprise the whole range of direct and indirect governmental expenditures, including, for example, "administrative expenses (salaries, travel, printing, communication, supplies, etc.), regulatory, enforcement, training and research costs, and State grants-in-aid." J.A. at 37. The Secretary is told to apportion the costs among pipeline companies and to devise a schedule of assessments "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1).

Section 7005 is one of a number of new "revenue-enhancing measures" fashioned along a similar model. The goal of these devices—to deal affirmatively with the federal deficit problem without incurring the political risk of new tax assessments—has been widely reported, and the implementation of this goal in recent statutes has taken various forms, including grants of authority to the Federal Energy Regulatory Commission,[2] to the Nuclear Regulatory Commission,[3] and to DOT to impose annual assessments sufficient to recoup all or a specified portion of their regulatory budgets.

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[1] The regulatory programs in question are the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001 *et seq.*, and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) § 1671 *et seq.* These programs establish a regime of regulatory standards which are enforced through a system of inspections; violation of DOT regulations may subject a pipeline to a range of civil and criminal penalties.

[2] The delegation to FERC was ultimately enacted as Section 3401 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1890-91. Section 3401 directs the Commission to formulate and impose annual charges sufficient to cover the Commission's entire regulatory budget, and to select any basis for formulating the assessments that is "fair and equitable."

[3] *See* COBRA § 7601(a), 100 Stat. 146-47.

In enacting Section 7005, Congress was plainly intending to supplement the authority that the Department of Transportation already possessed, under a separate statute,[4] to impose "specific fees for specific inspections," or otherwise to recover costs that individual pipelines imposed on the agency in connection with its programs. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). By contrast to this existing authority, Section 7005 instructs the agency to recover all of its general regulatory costs, including, for example, the costs of conducting research and providing federal grants to the States, irrespective of any costs an individual firm caused the agency to incur. J.A. at 37.

Congress frankly acknowledged the substantive discretion it was conferring upon the Secretary in allocating the tax burden among members of the pipeline industry.

> Because the costs of administering DOT's program are shared by the entire pipeline industry, some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary.
>
> This subsection specifies that the formula must be "reasonable," and gives the Secretary discretion to select among several different approaches for allocating total costs fairly among the various pipelines.

H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

In a notice that appeared in the *Federal Register* on July 16, 1986, the Department announced that it had selected "pipeline mileage" as the basis upon which to make its assessments. J.A. at 35. On July 28, 1986, DOT issued a notice of assessment to appellee Mid-America Pipeline Company demanding payment of $53,023.52. Because pipeline miles were selected as the basis for this assessment, Mid-America paid an assessment proportionately higher than pipelines which gen-

[4] Independent Offices Appropriation Act of 1952, 31 U.S.C. § 9701.

erate more revenue or move greater volumes over a shorter distance.

Mid-America receives no direct services from DOT and is not dependent on the agency for permission to operate. The Department's relationship to Mid-America and other pipelines is strictly that of a policing agency: DOT promulgates safety standards which it enforces through inspections, testing, and other enforcement measures. Mid-America makes no application for licensing, seeks no benefits from DOT services, participates in no voluntary proceedings before the Department, and otherwise has little contact with DOT except as a potential object of DOT enforcement schemes.

B. The Proceedings Below

This action was filed in the United States District Court for the Northern District of Oklahoma on September 4, 1986. Mid-America and the Government filed cross-motions for summary judgment which were assigned to a magistrate for consideration. After holding a hearing on the motions, the Magistrate issued Findings and Recommendations. *See* Appendix to Jurisdictional Statement at 1a-13a. Applying the standards established by this Court in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), the Magistrate rejected the Government's attempt to characterize Section 7005 assessments as mere "fees," for these were plainly involuntary exactions imposed on pipeline companies to cover the general regulatory activity of the agency and not an attempt to measure the costs that Mid-America may have imposed on the agency. Magistrate Wagner held that under *National Cable*:

> Where [as here] no request for an agency's services is made and no specific benefit is conferred upon the one being assessed, the assessment cannot be labelled a "fee" . . . .
>
> The assessment under § 7005 is not "incident to a voluntary act" . . . nor does it "bestow a benefit on

> the applicant not shared by other members of society" . . . . It, too, could easily be likened to "an involuntary exaction for a public purpose," . . . the purpose being the regulation of natural gas and hazardous liquid pipeline usage. Therefore, the Magistrate concludes that the "fees" assessed under § 7005 are taxes.

J.S. App. at 4a-5a. In addition, the Magistrate concluded that the breadth of discretion afforded the Secretary in setting these fees was in no way comparable to the directions Congress gave administrative officials in any cases cited by the Government:

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes.

Id. at 10a. He therefore concluded that Section 7005 was an unlawful delegation of Congress' power to tax. *Id.* at 10a-11a. After full re-briefing, on December 30, 1987, the district court issued an order adopting the Magistrate's recommendations. *Id.* at 14a. Judgment was entered on February 9, 1988, (*id.* at 15a-16a), and this direct appeal followed. *Id.* at 17a. Although the Government thereafter introduced legislation that would have established the rate of assessment by statute, that bill was subsequently withdrawn.[5]

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[5] Subsequent to the district court's decision below, the Department drafted a proposed legislative amendment to Section 7005 in an effort to cure the statute by eliminating the Secretary's discretion to select a taxing formula. *See* H.R. 2266, 100th Cong., 2nd Sess. § 301 (1988). The proposed amendment would have replaced the discretion afforded the Secretary to choose a rate with a congressionally-chosen criterion: "in *miles* of natural gas transmission and hazardous liquid pipelines . . . ." *Id.* (emphasis added). The

SUMMARY OF ARGUMENT

1. The Constitution establishes, and the three Branches have historically always respected, a careful separation of responsibilities regarding tax law, beginning with the commitment that "All Bills for raising Revenue shall originate in the House of Representatives." Art. 1, § 7, cl. 1. There is a precise history to that commitment, deeply rooted in colonial worries about taxation without representation. The Origination Clause in response to those concerns requires that legislators—in particular, congressmen, frequently and immediately accountable to the people by virtue of their two-year term—must pass on tax legislation. By knowing their representative's position on the levy of a tax, the people can respond to any perceived unfairness in the most elemental way allowed in a democracy, by casting their own votes against, and withholding their support from, those who supported the particular tax. For this reason, under the Constitution, "Congress [] is the sole organ for levying taxes. . . ." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974).

The method of making tax law embodied in Section 7005 nullifies the plain terms and frustrates the intended purpose of the constitutionally prescribed method of making tax law. In Section 7005, Congress remits to an executive official, beyond the reach of the electorate, the most crucial of all taxing decisions, the allocation of the tax burden among firms and individuals. The people are thus deprived of their right to know how their direct representatives stand on that decision, in plain contra-

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section-by-section analysis accompanying the proposed amendment explained the reason for the change as follows:

> . . . this amendment would clarify the intent of Congress in adopting Section 7005, and prescribe in the statute the only criteria which reasonably reflects the relationship between the Department's pipeline safety program and pipeline operations.

Id. The proposed amendment was deleted, however, prior to House consideration of H.R. 2266 (under suspension of the rules) on April 19, 1988. *See* 134 Cong. Rec. H1670-H1680 (April 19, 1988).

vention of the Origination Clause. According to the model of tax lawmaking established by Section 7005, taxes are not originated by bills, but by agency rules, and those rules originate not in the House of Representatives, but in a notice of proposed rulemaking in the *Federal Register*. Section 7005 thus circumvents "the carefully crafted restraints spelled out in the Constitution," (*INS v. Chadha*, 462 U.S. 919, 959 (1983)), and thwarts "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

2. Section 7005 is also unconstitutional for the distinct but related reason that it attempts to assign a non-delegable lawmaking function to an executive officer in a manner fundamentally at odds with principles of separation of powers. The Constitution requires "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Although "a practical construction of the Constitution" sometimes requires Congress to delegate substantive discretion to the Executive, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). Similarly, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Chadha*, 462 U.S. at 953 n.16, *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

The propriety of an assignment of substantive authority by the Legislative Branch to the Executive depends upon the nature of the power being delegated, (*see Lichter v. United States*, 334 U.S. 742, 778 (1948)), the competence of the respective branches in an institutional sense to exercise that power, (*see National Cable* 415 U.S. at 340-42), and the extent to which its exercise in

a particular instance may fairly be considered the "execution of the law in constitutional terms." *Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986). The Executive Branch enjoys no special competence in the field of taxation that would make it appropriate for executive officials to allocate tax burdens among the citizenry in the form of rules having the force of law. On the contrary, taxation is—and has always been—"a legislative function." *National Cable*, 415 U.S. at 340. Section 7005, by delegating the most delicate aspect of the taxing power—the power to allocate the tax burden by establishing tax rates—undermines the historic separation of the Branches in tax matters and "carries [the Executive Branch] far from its customary orbit. . . ." 415 U.S. at 341.

Neither can the assignment of taxing power to the Executive Branch in Section 7005 be described as merely the "faithful execution of the law." The "inherent necessities of . . . governmental coordination" often require that legislative programs be implemented not by inflexible statutory rules but by flexible delegations to the Executive. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). Thus, the Court historically has deferred to any colorable assertion that the best way to address some problem is not through a fixed statute, but rather a flexible rule for executive officials to apply to the myriad facts and circumstances that might arise over time, even to the extent of allowing executive officials to make "quasi-legislative" rules to implement that program. In this case, however, there was no program to "faithfully execute," only an unpopular taxing decision to make. Where Congress attempts to transfer to executive officials, particularly in the taxing area, the power to make the decisions that Congress was unwilling to make, that assignment cannot be reconciled with the constitutional separation of powers. If the language in the Constitution is to have any meaning, the unadorned power to make law cannot also be the faithful execution of the law.

ARGUMENT

CONGRESS MAY NOT ASSIGN THE TAXING POWER TO THE DEPARTMENT OF TRANSPORTATION.

The simple command of the Origination Clause—that all tax legislation should originate in the House of Representatives—emanates from a familiar historical premise, taught to many of us in high school, that there should be "no taxation without representation." Section 7005 now puts at issue the care with which the Framers incorporated this deeply rooted premise into the constitutional text.

In Section 7005, Congress instructs an administrative agency to establish both the subject matter and the rates of tax. The Government seeks to justify this action by rewriting the constitutional text, claiming to see no Origination Clause difficulty so long as, under the Government's reading of that Clause, "All Bills *authorizing the Executive Branch to decide* how to raise Revenue" originate in the House of Representatives. But the Government's attempt to justify taxation by administrative rulemaking trivializes not only the constitutional text, but the basic principles that are embraced by that text. There may be good, and constitutionally sufficient, reasons to allow Congress to delegate substantive decisionmaking power to executive officials in some cases—because some broad congressional purpose arguably demands that the Executive be left with flexible decisionmaking power as a necessary concomitant to the "execution of the laws." But a brief history of the taxing power shows why the Constitution requires revenue raising to be conducted on very different premises, premises that emphasize the accountability of elected officials, directly to the people, for the federal government's taxes.

I. Constitutional Restraints On Exercise Of The Taxing Power Are Deeply Rooted In Our Heritage.

A. *The Origination Clause And Its Historical Foundations.*

For the population in the American colonies, "[p]opular control of taxation was deemed the very foundation of representative government. . . ." E.J. Ferguson, *The Power of the Purse* 111 (1961). Tracing its historical lineage from the English "rule of Government," which afforded the House of Commons the exclusive prerogative to originate money bills, the precept of popular control over taxation shares both the philosophic and pragmatic underpinnings of the English system. "The general reason given for this privilege of the house of commons is that the supplies are raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves." 2 J. Story, *Commentaries on the Constitution of the United States* § 871 (DeCapo ed. 1970); 1 W. Blackstone, *Commentaries* 163-64 (1765). More specifically, the rule reflected the conviction that a "temporary, elective body, freely nominated by the people" would better resist the demands of the Crown for additional money. 2 J. Story, *supra*, at § 871; 1 W. Blackstone, *supra*, at 163-64.

With the power of the House of Commons as their model, the colonial assemblies insisted upon their right to exercise the same privileges and prerogatives as the English Parliament. Thus, beginning in Massachusetts, colonial assemblies asserted control over taxation as a means of constraining the power of the colonial Governors, the colonial "Executive Branch," appointed by the Crown: "The exclusive right to levy taxes, which the charter of Massachusetts gave its assembly, became the universal practice in the country, and the principle which it embodied became the fundamental American concept of government." 1 F.N. Thorpe, *The Constitutional History of the United States* 15 (1970). Through the assemblies' control of the purse, the colonists controlled

their government. *See* A.H. Kelly & W. A. Harbison, *The American Constitution* 31 (1948) ("This victory over the purse strings, recapitulating as it did a like victory by the House of Commons over the Crown, was of tremendous importance in the growth of colonial internal autonomy").

The abhorrence of "taxation without representation," and the view that it was among the most basic rights of a civilized people to control directly those who would tax them, triggered a series of grievances (ultimately leading to the Revolution). The commitment to popular control of taxation, for example, was embodied in the reaction to the Stamp Act, and succinctly stated in the Declaration of Rights of the 1765 Stamp Act Congress,[6] in which, "respecting the most essential rights and liberties of the colonists," the congress declared:

> That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.

Quoted in 2 P.B. Kurland & R. Lerner, *The Founders' Constitution* 375 (1987). While the remonstrances against the Stamp Act resulted in its quick repeal, that reprieve was short-lived. "[U]nder the influence of the stubborn George III, the policy of arbitrary taxation for the colonies was resumed in a new mode," ultimately

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[6] The Stamp Act, which the British Parliament passed in 1763, sought to tax the colonists to support the prosecution of the French and Indian War. Although the tax itself was rather modest, its arbitrary imposition on the colonists, who had no voice in its enactment, created a furor. Delegates assembled for the convention in New York City in October 1765 and renounced the Act. That assembly—which later came to be known as the Stamp Act Congress—produced a Declaration of Rights in which it urged repeal of the Act. Early the next year, the Stamp Act was repealed. *See generally* J. Schouler, *Constitutional Studies: State and Federal* 79-80 (1971).

prompting an outbreak of violence and the calling of the Constitutional Congress. J. Schouler, *Constitutional Studies: State and Federal* 80 (1971).

Following the Revolution, there was at first so deep-seated a commitment to local popular control over taxation that the first effort to form a central government under the Articles of Confederation denied the central government any taxing power at all. Against this backdrop, it is hardly surprising that one of the most sharply debated issues during the Constitutional Convention and ratification process was not merely the need for a centralized power to tax, but the way to constrain its exercise. Although the Framers acknowledged the need for a government with revenue-generating authority, they continued to recognize that, in Madison's words, there was no power more dangerous than the taxing power. *See The Federalist No. 10,* at 57 (Modern Library ed. 1937). They therefore sought protection against its abuse in the structure of government they created.

The Origination Clause, as originally proposed, was intended to prevent the "senatorial branch from originating money bills." As Elbridge Gerry, one of its principal proponents, put the matter: "The other branch [the House of Representatives] was more immediately the representatives of the people, and it was a maxim, that the people ought to hold the purse-strings." 5 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 188 (1896). As Gerry later explained, "[T]axation and representation are strongly associated in the minds of the people; and they will not agree that any but their immediate representatives shall meddle with their purses." *Id.* at 416.[7]

[7] Although Mr. Dickenson, speaking in support of the proposal, declined to offer a theoretical rationale for the rule, he found an empirical one: "[E]xperience verified the utility of restraining money bills to the immediate representatives of the people," and he saw no reason to "upset the people by disturbing their customary

In support of the Origination Clause before the Convention and in the States, the remarks of the Framers summarize the reasons why taxation was committed to Congress, and why the House would have to play a special role in regard to revenue raising.

1. Voicing his support for the Origination Clause and the more general principle of direct democratic control over those who would make taxing decisions, Benjamin Franklin explained that

> it was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim, that those who feel can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.

5 *Elliot's Debates, supra,* at 284. As Franklin's comment suggests, the requirement that revenue bills be initiated in the House of Representatives serves two closely related purposes: it preserves immediate political accountability for the federal government's taxing decisions and allows the people to influence directly the shape of tax legislation through access to their direct representatives. Put more bluntly, the Origination Clause forces at least one member to move the introduction of a tax bill and compels all of them to decide, one way or the other, how taxes shall be laid. Based on the vote of their representative, the "people can then mark him" [8]—and take appropriate action at the ballot box at the next biennial election.

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right." 5 *Elliot's Debates, supra,* at 418. Mr. Randolph put it more colorfully: "When the people behold in the Senate the countenance of an aristocracy; and in the President, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives a right which has been so long appropriated to them." *Id.* at 419.

[8] 5 *Elliot's Debates, supra,* at 189 (Williamson).

2. At the Virginia Convention, John Marshall built upon the theme that the federal government could not impose a tax without the House passing on the question; because the members of the House were immediately beholden to their constituents for their office, the people would be protected from unfair taxation:

> Is the system so organized as to make taxation dangerous? . . . . No tax can be laid without the consent of the House of Representatives. . . . We are told that they may abuse their power. Are there strong motives to prompt them to abuse it? Will not such abuse militate against their own interest? Will not they and their friends feel the effects of iniquitous measures? Does the representative remain in office for life? Does he transmit his title of representative to his son? Is he secured from the burden imposed on the community? To procure their reelection, it will be necessary for them to confer with the people at large, and convince them that the taxes laid are for their good.

3 *Elliot's Debates, supra,* at 230-31.

3. Finally, James Madison's letter to the People of New York anticipated the way that citizens would exercise control of the other branches through the House of Representatives' control of the purse strings:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. *This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of*

> *the people*, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 380 (Modern Library ed. 1937) (emphasis added).

Thus, at the same time as the Framers regarded the power of taxation to be among the most important and far-reaching afforded the National Government, they entrusted protection from its abuse to the structure of the government they established. As John Marshall, as Chief Justice, explained in *McCulloch v. Maryland*, the need for close adherence to the structure of government as prescribed in the Constitution provides the *only* assurance against unwise taxation.

> It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
>
> *The people . . . give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interests of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse.*

17 U.S. (4 Wheat.) 316, 428 (1819) (emphasis added).[9]

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[9] *See also Spencer v. Merchant*, 125 U.S. 345, 355 (1888) ("The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected") (citations omitted).

B. *Historically, The Careful Delineation Between The Roles Of The Legislative And Executive Branches In Matters Of Taxation Has Always Been Respected.*

1. *Congress Has Always Set Tax Rates.*

Following the constitutional prescription, for nearly two hundred years, Congress has guarded its prerogative to determine tax rates. Despite a continual (albeit necessary) congressional preoccupation with revenue-raising, the fundamental function which the people associate with taxation—the allocation of the tax burden—has remained the exclusive prerogative of Congress.

Congress' early revenue raising efforts mirrored the conventions of the day, including the kinds of imposts that the Crown had imposed—"duties" on stamps for official documents, import duties upon a wide variety of commodities, including tobacco, liquor, salt and sugar, and excise taxes on liquor and carriages.[10] These early laws aptly illustrate the tenet that Congress allocates the burdens of a tax. Thus, in its second enactment, Congress set forth in great detail the rates of taxation (Act of July 4, 1789, ch. 2, 1 Stat. 24), and later revised those rates several times within the First Session. At the same time, the role of the Executive Branch was entirely administrative, not substantive: The Secretary of the Treasury was directed "to prepare plans [and] . . . superintend the collection of the revenue." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65.

Similarly, the early revenue acts cited by the Government as "important evidence" of a broad substantive role expected for the Executive Branch in matters of taxation (Gov't Br. at 14) are as illuminating as any in evidencing Congress' commitment to the setting of tax rates, and the assignment to the Executive Branch of the en-

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[10] *See generally* D. Forsythe, *Taxation and Political Change in the Young Nation* 24-25 (1977).

forcement and collection for which that Branch was suited. In every instance cited by the Government, Congress set the rate with specificity and detail:

- The Act of March 3, 1791, ch. 15, §§ 1, 3, 1 Stat. 199, set duties on distilled spirits, describing those duties with specificity. The only authority granted the Secretary of the Treasury was the execution and enforcement of the law in a classic sense, including the power to compromise penalties that had been assessed where he concluded there had been no willful violation.
- The Act of June 5, 1794, ch. 48, §§ 1, 2, 1 Stat. 376, set forth, again in precise detail, duties to be imposed "on licenses for selling Wines and foreign distilled spirituous liquors by retail." Chapter 49, relied on by the Government, was concerned with the *collection* of those and similar duties. It allowed the President to set up taxing districts to which he would appoint supervisors and inspectors (revenue agents, *see* § 12) to collect the duties.
- The Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, which the Government describes as "most instructive" (Gov't Br. at 14), describes in great detail the duties on official documents (*i.e.*, a stamp tax) that Congress imposed under the Act. The tax rates are clear and precise.[11]

In short, if the Constitution had allowed it, we might have had a government under which the legislature would determine the total amount of revenue to be raised and the sheriff authorized (subject to certain limitations) to obtain those sums, determining how much and from

[11] The provision of this law specifically cited by the Government (§ 2) simply allowed that in lieu of the computation of the stamp tax on the notes of banks, the Treasury could agree to "an annual composition for the amount of such stamp duty . . . of one per centum on the amount of the annual dividend made by such banks, to their stockholders respectively." 1 Stat. 528. The rate of assessment was clear, precise and determined by Congress.

whom those sums should be taken. Or, following the model of the Articles of Confederation, Congress might simply have determined what was needed and "requisitioned" the Executive Branch to provide those sums using various devices of the Executive's choosing. Although the convenience and efficiency of such methods of revenue-raising must have been apparent even in the 18th century, that is not what the Constitution provided, and that is not what Congress historically sought to implement.

Although the development of federal income taxation after 1913 gave Congress new flexibility in taxing, this has not disturbed the fundamental division of responsibility between Congress and the Executive in matters of taxation. While Congress has long charged the Secretary of Treasury with the power to collect taxes and enforce the Internal Revenue Code, and to make rules associated with that mission (*see* 26 U.S.C. § 7805), executive officials have not been given the authority to allocate the taxing burden by setting tax rates. Rather, the Secretary's role is to enforce and administer—to oversee the identification of income subject to tax and to collect the taxes prescribed by Congress. As the Service's own Statement of Principles explains:

> The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress. With this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner. . . .

Rev. Proc. 64-22, 1964-1 CB 689, regularly published in the *Cumulative Bulletin.*

The limited role of the Executive in tax matters is further reflected by the fact that although the Secretary of the Treasury may issue *interpretive* regulations, those

regulations are denied the force of law. Thus, *unlike* other executive agencies, which have been granted the authority to promulgate "quasi-legislative rules," Treasury regulations are not binding as law on the courts. As the Court has repeatedly emphasized, the Secretary's authority "to prescribe rules and regulations . . . is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equipment Co. v. C.I.R.*, 297 U.S. 129, 134 (1936).[12] The Secretary of the Treasury is authorized to make rules, *with* binding effect, *only* in certain esoteric areas of income definition and in matters of enforcement and collection. *See, e.g.*, 26 U.S.C. § 1502 (directing the Secretary to prescribe regulations relating to the filing of consolidated tax returns).

2. *Decisions Of This Court Have Maintained The Division Between The Legislative And Executive Roles In Matters Of Taxation.*

More recently, this Court's decisions in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974), have confirmed the constitutional impediments that stand in the way of any attempt by Congress to grant executive agencies authority in this field. In these cases, the Court was presented with attempts by the Federal Communications Commission ("FCC") and the Federal Power Commission ("FPC"), at the statutory invitation of Congress, to recoup the full costs of their regulatory activities by imposing assessments on the firms subject to their respective juris-

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[12] *See also Helvering v. Sabine Transp. Co.*, 318 U.S. 306, 311-12 (1943) (invalidating Treasury Regulations designed to deny to a corporation "dividends paid credit" that were properly claimed under the Revenue Act of 1936 as an improper "attempt to legislate"); *Kurzner v. United States*, 413 F.2d 97 (5th Cir. 1969); *United States v. Empey*, 406 F.2d 157 (10th Cir. 1969).

dictions. Relying on the Independent Offices Appropriation Act of 1952 ("IOAA") (now codified at 31 U.S.C. § 9701), directing agencies to assess fees to recoup fully the costs of their regulatory operations, the FCC and FPC developed "fee schedules" designed to make the agencies economically self-sufficient. *See National Cable*, 415 U.S. at 339; *New England Power*, 415 U.S. at 348-49.

In rejecting a construction of the IOAA that would have allowed—as it seemed to allow—federal agencies to set the rates to finance their activities, this Court held that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341. The Court noted that to have read the statute literally "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House" and that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power . . . ." *Id.* The Court emphasized the difference between allowing an agency to determine what to charge for the specific costs that a given firm imposed on an agency, *i.e.*, fee-setting, and the broader power to raise revenue to fund the agency's general costs of operation, a question of taxation in the sense contemplated by the Framers. In short, the Court concluded that because "[t]axation is a legislative function" and "Congress [] is the sole organ for levying taxes," (*id.* at 340), the IOAA had to be read "narrowly as authorizing not a 'tax' but a 'fee.'" *Id.* at 341.[13]

[13] The lower courts have consistently recognized the constitutional underpinnings of *National Cable*. *See Sohio Transp. Co. v. United States*, 766 F.2d 499, 503 (Fed. Cir. 1985) (*National Cable* is premised on the recognition that it would be "an unconstitutional delegation of Congress' exclusive power to tax" for agencies to be allowed to impose charges to recover expenditures for the public interest); *Central & Southern Motor Freight Tariff Ass'n v. United*

II. The Method Of Making Tax Law Under Section 7005 Contravenes The Origination Clause And Eliminates Legislative Accountability For Taxing Decisions.

The question posed by this case is whether the Constitution bars Congress' attempt to assign the authority to set tax rates to an Executive Department. The first obstacle to such assignment is the Origination Clause: Section 7005's delegation of tax-setting authority to an unelected administrative official circumvents the process of making tax law defined by the Origination Clause and defeats the objectives the Framers specifically designed it to achieve. To allow agency officials to make the tax writing decisions the Framers intended our immediate representatives to make (here, the allocation of the tax burden among pipelines) renders the Origination Clause an "empty formality." *Chadha*, 462 U.S. at 958 n.23.

States, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies are prohibited from assessing fees in order to recover the full costs of regulation because such charges are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *National Ass'n of Broadcasters v. Federal Communications Comm'n*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) (*National Cable*, "as part of the basis for its opinion, relied on Art. I, § 1 and § 8, par. 18 of the Constitution in holding that taxation is an essential legislative function that Congress cannot 'abdicate or transfer to others' "); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied by Congress"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 227 (5th Cir. 1979) (*National Cable* construed the IOAA narrowly so as not to "offend the constitutional mandate that only Congress has the 'Power to levy and collect Taxes' "), *cert. denied*, 444 U.S. 1102 (1980); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983) ("The Court said that assessing industry members for the costs of oversight over the entire industry would require the members to pay 'not only for benefits they received but for the protective services rendered the public by the Commission' in its regulatory role, and suggested that such an assessment might be an unconstitutional tax"). *But see Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).

A. *The Process Of Making Tax Law Described By Section 7005 Is Not The Process That The Constitution Requires.*

First among the enumerated powers of Article I, the taxing power is entrusted to Congress: "The Congress shall have Power To lay and collect Taxes . . . ." Art. I, § 8, cl. 1. And with unusual specificity, the Origination Clause requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . .," (art. I, § 7, cl. 1), whose members were made frequently and directly accountable to the electorate for their decisions (art. I, § 2, cls. 1, 3). The Constitution itself, therefore, sets forth rather precise procedural safeguards against abuse of the taxing power. Those procedures are designed to maximize the people's control over the taxing decisions of the federal government by assigning special responsibility to the House whose members must pass the voters' scrutiny every two years.

The Origination Clause is among those "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha*, 462 U.S. at 945. Like the bicameral requirement frustrated by a similarly innovative method of making law in *Chadha*, this additional provision of Article I, § 7 reflects the Framers' attempt to control the tendencies they feared in a centralized federal government. Specifically, this Clause is designed to compel Congress, at the initiative of the House of Representatives, to frame the bills, and enact the statutes, that decide who is to pay how much to support the federal government. Under the Origination Clause, revenue must be raised by *bills*, not by agency rules, and those bills must originate in the *House of Representatives*, not in a notice of proposed rulemaking published in the *Federal Register*.[14]

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[14] This Court has not heretofore hesitated to sustain separation-of-powers claims that rest upon departures from the plain textual

Section 7005 departs in a most fundamental way from the constitutional scheme: the means of allocating the government's tax burden is now to be established by an executive bureaucracy beyond the control of the electorate. The taxing and spending functions are thus effectively combined in the Executive, relieving obvious pressures on both Branches but diminishing the accountability of both as well. This delegation of authority—held on indistinguishable facts in *National Cable* to involve the assessment "of 'taxes,' which under our constitutional regime are traditionally levied by Congress," (415 U.S. at 341) —involves the most delicate issue of taxation, the selection of tax rates. Although determining how much total revenue the government needs is surely important, the question of taxation with which people are ultimately concerned is how a tax will affect them, individually, in the pocketbook. The sting of taxation is in its allocation —deciding who shall pay how much relative to others— and it is here that the difficult and politically sensitive choices are made.

The legislative decision delegated by Section 7005 is just this power to set tax rates—*i.e.*, the *distributive* decision is left entirely to the agency. Mid-America's allocated share of the industry's tax burden depends entirely on which of the four "choices" for apportionment was selected by the agency: "volume-miles," "miles," "revenues," or "an appropriate combination thereof." Because there is a ceiling on the total amount to be recovered,[15] any formula that reduces someone else's assessment increases Mid-America's, rendering the determination one of particular sensitivity.

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requirements of the Constitution. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (Appointments Clause); *INS v. Chadha*, 462 U.S. 919 (1983) (bicameral requirement and Presentment Clause). There is no reason to allow a departure from that text here.

[15] Section 7005 requires DOT to make assessments not exceeding 105 percent of the agency's program budget. Section 7005(d).

Section 7005 commits this determination to an administrative context that possesses neither the "public" qualities of the legislative arena nor, more importantly, decisionmakers who are immediately accountable for what they decide:[16]

1. The reason that revenue raising was committed to legislators is because congressmen are elected and thereby accountable for their decisions in a way that administrators are not. The difficulty with a transfer of legislative authority to executive officials is not

> that such "faceless bureaucrats" necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are.

J. Ely, *Democracy and Distrust* 131 (1980). The Framers' assignment of taxing authority to Congress, and more particularly to the House of Representatives, guaranteed to the people the one sure means of curbing unfairness in the exercise of that power: the ability to turn their representatives out of office.

In its passing treatment of the Origination Clause, the Government argues that the House was made the originator of tax bills because the Framers "believed that the House of Representatives would 'possess more ample means of local information.'" Gov't Br. at 14 n.7 (citation omitted). The Government then argues that times have changed, and that Congress could now justifiably conclude that the conditions that made the House of Rep-

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[16] The fact that Section 7005 is not the only recent enactment authorizing an executive agency to recoup its costs by imposing annual assessments upon those it regulates should "sharpen rather than blunt" this Court's scrutiny. *See Chadha*, 462 U.S. at 944. Given the obvious attraction that avoidance of unpopular decisions holds for elected officials, the Court's holding in this case will likely shape for decades to come the manner in which the federal government finds it convenient to fund its activities.

resentatives the appropriate taxing authority in the eyes of the Framers no longer exist. It says that:

> Today, in a much more complex society, Congress could rationally conclude that only by conferring broad authority on the Executive to investigate conditions in particular industries would sufficient "local information" be generated to allow satisfactory fee schedules to be fixed.

Id. But to find in the Origination Clause—or indeed, in the House of Representatives—nothing more than a vehicle for obtaining "local information" on "conditions in particular industries" is to ignore the basic purpose of representative government and the role of the House in ensuring representativeness.

The problem with the Government's theory is that under a statutory delegation like Section 7005, people are deprived of the opportunity—particularly as respects the House of Representatives, whose members must face the electorate every two years—to use the election as a referendum on their legislators' votes. A voter cannot demand accountability from his congressman on tax matters if that congressman can simply create a process under which he need never take a stand on the taxing issue upon which he might be judged, the allocation of the tax burden upon his constituents.

2. Delegations like Section 7005 also change the process by which interested parties can influence taxing decisions directly. Citizens have historically enjoyed remarkable recourse to congressmen, congressional committees and their staffs, to weigh in on the way that taxes will be levied. This type of face-to-face exchange with the decisionmakers on tax issues, perhaps the most pervasive activity of Congress, appears to function well—or, at a minimum, as the Framers intended. Recourse to the administrative rulemaking process carries with it none of the political or public elements that the Framers plainly

expected to be part of the process of tapping the people's purses.

3. Finally, as James Madison predicted (*supra* at pp. 14-15), the power of the purse has in fact become one of the most effective means by which the House of Representatives exercises supervisory control over executive agencies, and the people (through their control of the House) thereby exercise control over the activities of the federal government. The process by which Congress has called agency heads to account for the yearly appropriation increases they seek—and, in so doing, called upon those officials to explain how they are spending money, to what end and with what degree of waste and inefficiency—has proven a forceful check on executive activity. Such oversight, by its nature, checks regulatory growth. The impetus for oversight comes, of course, from Congress' understanding that it will be answerable for every increase in agency spending because it is the body that must raise taxes to pay burgeoning administrative costs. Section 7005 and its progeny remove the impetus for congressional oversight over agency activity. A self-financing agency can avoid congressional inquiry about increased spending levels, increased regulatory activity, and possible agency inefficiency, simply by assuring Congress that *Congress* need take no action because the agency is self-financing.[17]

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[17] It could be argued that this tendency to allow agencies to function on "automatic pilot," without significant budgetary oversight, might be present even if Congress establishes the allocation. This is not correct. *First,* if Congress was required to allocate the tax burden in the first instance (and suffer the consequences), it is arguable that it would not have created the tax in the first place. *Second,* if Congress had established the formula, and was answerable for it, then every increase in congressional appropriations to an agency would be through Congress' formula, to burden the taxpayer. Congress could not so easily blink its responsibility for the agency's actions and the resultant increases in taxes.

That it may be convenient to allow agencies to fund themselves through formulas of their own choosing is, of course, quite beside the point. Concededly, from a political, and perhaps even utilitarian point of view, the model of self-financing executive satrapies suggests obvious efficiencies and convenience. "But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *Chadha*, 462 U.S. at 945. Under the constitutional plan, expedience is not valued over adherence to the rule of law. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives —or the hallmarks—of democratic government . . . ." *Bowsher*, 478 U.S. at 736 (*quoting Chadha*, 462 U.S. at 944).

B. *This Court's Decisions Reflect An Insistence That Congress Make Tax Law In A Manner Consistent With The Constitutional Plan.*

In seeking to rationalize Congress' effort in this instance to avoid its traditional responsibility for making tax policy and setting tax rates, the Government points to other instances, not involving general revenue raising, in which a delegation has been sustained. The Government's arguments are fundamentally flawed, however, by their failure to distinguish between two lines of cases. These cases recognize that revenue raising, *i.e.*, the imposition of taxes to fund general governmental activity, rests on a different set of constitutional principles than other legislative devices (such as charging fees for government services) that only incidentally raise money.

1. *National Cable* and *New England Power*. Under facts virtually identical to those at issue here, this Court in *National Cable* and *New England Power* enunciated a

means of distinguishing the exercise of taxing authority from other money raising devices. The holding of *National Cable* was that when an agency attempts to impose assessments to cover generally the costs of its regulatory operations, without linking it to the costs that a particular firm has imposed on the agency, "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341.

The lower courts have had little difficulty applying this distinction.[18] *See, e.g., Central & Southern Motor*

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[18] The lower courts' application of the *National Cable* distinction between permissible fees and impermissible taxes has occurred in cases both under the IOAA and in cases involving other statutes conferring fee-setting authority.

Under the IOAA: *Phillips Petroleum Co. v. FERC,* 786 F.2d 370 (10th Cir.) (fees charged for processing tariff filings and responding to other specific requests), *cert. denied,* 479 U.S. 823 (1986); *Central & Southern Motor Freight Tariff Ass'n v. United States,* 777 F.2d 722 (D.C. Cir. 1985) (fees charged for processing rate tariff applications and approving rate agreements); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n,* 683 F.2d 12 (1st Cir. 1982) (fees charged for processing nuclear reactor licenses); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n,* 601 F.2d 223 (5th Cir. 1979) (fees charged for processing applications for nuclear reactor licenses and permits), *cert. denied,* 444 U.S. 1102 (1980); *Air Transport Ass'n of America v. Civil Aeronautics Board,* 732 F.2d 219 (D.C. Cir. 1984) (fees charged for processing tariff filings and other documents that required CAB action).

Other statutes: *Sohio Transp. Co. v. United States,* 766 F.2d 499, 502-04 (Fed. Cir. 1985) (applying *National Cable* to the Mineral Leasing Act); *Nevada Power Co. v. Watt,* 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable* to a revenue raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus,* 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n,* 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable* to a revenue raising delegation in the Federal Water Power Act), *cert. denied,* 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States,* 9 Cl. Ct. 723, 738-39 (1986) (same), *aff'd,* 831 F.2d 1043 (Fed. Cir. 1987).

Freight Tariff Ass'n v. United States, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies may not impose "fees or assessments [that go] beyond the recovery of costs for benefits conferred upon identifiable beneficiaries" because such assessments are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983) (under *National Cable*, an "applicant may not be charged for work relating to the agency's general costs of administration"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 228 (5th Cir. 1979) ("what the Court found objectionable" in *National Cable* "was the agency's attempt to recover the entire cost of regulating"), *cert. denied*, 444 U.S. 1102 (1980).

Like the assessments in *National Cable*, the assessment on Mid-America does not reflect the costs that it has imposed on the agency. Mid-America has not requested or received any service from DOT in exchange for which Section 7005 assessments are being charged. These annual charges are plainly not "for specific services to specific individuals or companies." *New England Power*, 415 U.S. at 349.[19] It was precisely on this basis that *New England Power* rejected the attempt of the Federal Power Commission to impose an industry-wide fee on natural gas pipelines designed to recoup the costs of administering the Natural Gas Act.

There is nothing obscure about the distinction between fees, which raise no constitutional concern, and the kind of revenue raising activity with which the Framers were primarily concerned in the Origination Clause. Fees are

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[19] Indeed, the Department of Transportation did not need Section 7005 to impose "specific fees for specific inspections," for it possessed that authority already. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). The surest indication that Section 7005 does not meet the test established by *National Cable* is the fact that even without Section 7005, DOT had the authority to set the charges *National Cable* allows.

what the Government charges for services performed. Premised on a basic *quid pro quo* relationship, fees are measured by the specific costs that an individual firm imposes on a government agency; if the agency can determine those costs, and link them to a given firm, there has been no discretionary revenue generated, merely reimbursement for costs incurred.

In terms directly pertinent to this case, DOT might have chosen to charge Mid-America for the direct and indirect cost of inspecting Mid-America's pipelines; the Department of Transportation has long had the authority to do precisely that. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). That is far different than raising money so that DOT can give grants-in-aid to the States, or fund its research projects, or conduct rulemaking or standard-setting, or attend interagency meetings, or give presentations to industry groups, or the host of other expenses incurred by the agency for the general welfare—all of which are to be recovered under Section 7005.[20] When the agency seeks to finance those costs, it

[20] In this sense, Section 7005 is unlike Congress' delegation of revenue raising authority to the Nuclear Regulatory Commission ("NRC") in COBRA Section 7601. *See Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988). Congress' instruction to the NRC to recover thirty-three percent of the costs of nuclear power plant licensing and inspection programs through a system of fees (*see* COBRA § 7601(a), 100 Stat. 146-47), was far narrower and much more akin to a traditional fee than that involved here. Much as this Court prescribed in *National Cable*, the delegation in Section 7601 was constrained by two specific statutory directions absent here: annual charges had to be (1) "reasonably related to the regulatory service provided by the Commission" and (2) had to "fairly reflect the cost to the Commission of providing such service." 846 F.2d at 775. In addition, Congress directed the NRC only to recover a third, not all, of its regulatory costs. These factors are crucial because the thirty-three percent of its budget that the NRC could recover under Section 7601 was related—in the view of Congress—to the services that the agency provided the industry. The agency's levy, therefore, was an approximation of the cost of services rendered in a manner closely akin to determinations involved in applying the IOAA.

is engaged in precisely the kind of revenue-raising activity, albeit on a specialized scale, with which the Framers were concerned.

The Government responds to this elemental distinction with the argument that statutes like Section 7005 involve only fees because they merely require entities to finance a "program of regulation made necessary by that [taxpayer's] activity." Gov't Br. at 21. This argument—apart from conflicting with the precise holding of *National Cable*—proves too much. In one way or another, private activity is the reason for most of government; if executive agencies need only collect "fees" to finance activities they feel "compelled" to provide, the "fee" exception would quickly engulf the power to tax.[21] Soon, much of government would be deemed to have been "made necessary" by private conduct the Government seeks to regulate, and political accountability for developing tax revenue to fund such regulation could be jettisoned under the expedient label of "fees." There is no demonstrable difference in this regard between the regulatory scheme at issue here and various other administrative programs to which companies like Mid-America are subject—programs administered, for example, by the Federal Energy Regulatory Commission (which has already received such a grant of taxing authority), the Occupational Safety and Health Administration, the Mine Safety and Health Administration, the Federal Communications Commission, the Interstate Commerce Commission or a host of other regulatory entities.

2. *Hampton* and *Head Money Cases.* Relying on their construction of a dictum in *J.W. Hampton, Jr. & Co. v.*

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[21] The natural extension of the Government's argument is that if a person or company exists, it must pay "fees" to compensate the Government for its right to exist as opposed to paying taxes which are determined by elected officials.

United States, 276 U.S. 394 (1928), and the *Head Money Cases*, 112 U.S. 580 (1884), the Government argues that irrespective of the Court's more recent decisions in *National Cable* and *New England Power*, an attempt to delegate the power to tax is not to be distinguished from any other type of delegation. Gov't Br. at 15. Contrary to the Government's suggestion, the Court in *Hampton* and *Head Money* neither reached nor resolved such issues.

At issue in *Hampton* was the authority of the President to determine equalizing tariffs for the myriad goods coming into the United States, country by country, all according to a strict formula established by Congress and factual determinations that Congress had directed the President to make. The petitioner in that case sought to characterize the establishment of these tariffs, which mirrored many similar delegations of power to the President in the area of foreign commerce (*e.g.*, *Field v. Clark*, 143 U.S. 649 (1892)), as nondelegable because the power to "levy taxes and fix customs duties" was nondelegable. 276 U.S. at 395-400. This Court held that the same principles that allowed Congress "to remit to a rate-making body . . . the fixing of . . . rates justifies a similar provision for the fixing of customs duties on imported merchandise." *Id.* at 409. The holding of the Court reflects the difference between imposing fees, as a method of regulating commerce in some field, and raising revenue for the general funding of government—the issue with which the Framers, in the Origination Clause, and this Court, in *National Cable*, were primarily concerned.[22] The President's broad authority in

[22] The Government makes the same mistake when it argues that *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), a case that involved a challenge to the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, and "which allowed the President to raise license fees on imports *when he found that such action was needed to protect the national security,*" (Gov't Br. at 18 (emphasis added)), also involved the issue of delegation of the taxing power presented here. *Id.*

the field of foreign affairs would fully warrant a broader grant of discretionary power to the President over tariffs than over a domestic revenue raising measure like Section 7005. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).[23]

For similar reasons, the other case primarily relied upon by the Government, *Head Money Cases*, 112 U.S. 580 (1884), has no relevance here. In *Head Money*, *Congress* had specifically set the imposts at issue at $.50 a head on each person entering the United States by ship. The case thus did not present, let alone decide, any issue of delegation or exercise of executive authority. The Court in *Head Money* held merely that "in the exercise of its power to regulate immigration," Congress had an *independent* constitutional basis for setting the duties quite apart from its taxing authority. 112 U.S. at 596. As the Court explained:

> The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the act, "An Act to regulate immigration," is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.

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[23] Equally important, the delegation to the President in *Hampton* was, in fact, well-constrained. Congress directed the President to make findings about the relative costs of production abroad and to employ tariffs to equalize those costs. Although fact-finding was involved, the President's substantive discretion was closely "canalized" by Congress. Unlike here, the President was not afforded the discretionary authority to determine by rule what he viewed as reasonable.

Id. at 595. *Head Money*, in short, involved an entirely different set of constitutional concerns (having to do, on the one hand, with the relationship between state and federal power and, on the other, with the scope of Congress' power to regulate foreign commerce) than are at issue here. In particular, the preservation of legislative accountability for making tax law, as required by the Origination Clause, was not the constitutional value that motivated or informed the Court's analysis.[24]

Notwithstanding the distinction between the *Hampton/Head Money* decisions and *National Cable/New England Power*, the Government implies that this Court somehow overlooked its earlier precedents when deciding *National Cable*. In fact, however, the Court's opinion in *National Cable* not only cites but quotes directly from *Hampton*, making it clear that the sort of commerce-related tariffs at issue in *Hampton* were fully understood by the Court as it reached its decision in *National Cable*. Drawing on the constitutional values underlying the Origination Clause, the Court in *National Cable* set forth with some precision a means for distin-

[24] *Clyde Mallory Lines v. Alabama ex. rel. State Dock Comm'n*, 296 U.S. 261 (1935), also cited by the Government (Gov't Br. at 22), is even less apposite. That case involved a challenge to a state harbor fee on the basis that such a state charge violated the Constitution's prescription against attempts to set "taxes and duties . . . [imposed] for the privilege of entering a port," (art. I, § 10, cl. 2). There the Court held no more than that the harbor fees in question were not imposed by the State for the privilege of entering a port, but rather to pay the cost of harbor services.

Finally, the Government's passing reliance on *Massachusetts v. United States*, 435 U.S. 444 (1978) (Gov't Br. at 23 n.12), has special irony: the statute at issue in that case was a paradigm of how Congress is supposed to act when it wants to raise revenue to finance a regulatory program. The Airport and Airway Revenue Act of 1972 involved no unbridled delegation to apportion a tax. Congress fixed the taxes on the use of the nation's airways, determining in each instance the specific amount of the tax, who should pay what, and the basis on which the tax should be assessed. Although these assessments were also "user charges" in some sense, Congress did not hesitate to label them what they were—taxes.

guishing between delegations of taxing authority, on the one hand, and delegations of a more limited authority (like fee-setting or tariff-setting), on the other hand, and held, on facts identical to those presented here, that the taxing power (in the strict constitutional sense) is involved when federal agencies fund general programs of regulation. In reaching that conclusion, the Court relied on a principle—that "Congress [] is the sole organ for levying taxes . . ." (415 U.S. at 340)—that matches precisely the sentiments of the Framers underlying the Origination Clause. The distinction drawn in *National Cable* is thus entirely consistent with the Constitution's requirement that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." [25] Section 7005 creates a method of revenue raising that flouts that constitutional command.

III. The Exercise Of Tax-Setting Authority Authorized By Section 7005 Cannot Fairly Be Characterized As An Executive Function.

Quite apart from Section 7005's departure from the Constitution's specific prescription for revenue raising, there is a second, equally fundamental flaw in Section 7005's approach to the making of tax law. The constitutional principles underlying separation of powers proceed from the fundamental notion that legislative power is granted to Congress, executive power is granted to the Executive, and the courts will develop decisional rules (often analyzed under the rubric of "delegation" principles) to distinguish and maintain separation between the two. And as a corollary: If the Constitution's careful apportionment of powers among the three branches

[25] In requiring that "[a]ll Bills *for raising Revenue*" be initiated in the House of Representatives, the Framers quite purposefully did not intend to include legislative measures "under which money might incidentally arise." 5 *Elliot's Debates*, *supra*, at 415 (Mason). *See generally*, 1 D.K. Watson, *The Constitution of the United States* 345-46 (1910).

is to have any meaning, it is necessary to posit at least *some* limitations on the ability of the Legislative Branch simply to assign issues to the Executive Branch for decision. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).[26] In Section 7005, Congress simply defied this principle by transferring unadorned legislative power to make a taxing decision to an executive agency.

It is true, of course, that even as the Court has reiterated the principle that the legislative power may not be delegated, it has not shied from the reality that executive officers may be allowed a genuine discretion to make binding rules.[27] "A practical construction of the Constitution" often requires Congress "to invest the President with large discretion in matters arising out of the execution of statutes":

> The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must,

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[26] *See also J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

[27] The Court has generally characterized such Executive rulemaking as "quasi-legislative." *See Chadha*, 462 U.S. at 953 n.16; *Wright v. Nagle*, 101 U.S. 791, 792-93 (1879); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). As noted earlier (pp. 18-19, *supra*), however, the Executive's power to enact "quasi-legislative" rules in the tax area is carefully circumscribed.

therefore, be a subject of inquiry and determination outside of the halls of legislation.

Field v. Clark, 143 U.S. at 694 (*quoting from Locke's Appeal,* 72 Penn. St. 491, 498).[28] In every instance in which the Court has sustained a delegation of substantive authority to the Executive Branch, however, there has been something more, some consideration allowing the conclusion that what the Executive was doing was not *merely* deciding what the Congress ought to have decided—*i.e.*, making the law—but rather performing some properly executive role of which that rulemaking was but a part. The issue thus remains to be determined in connection with any delegation whether an executive official is, in truth, being asked to perform a task that is properly described as "execution of the law in constitutional terms." *Bowsher*, 478 U.S. at 732-33.

Two factors have historically guided this Court in determining whether a grant of authority to an executive official is within the authority of Congress to give and executive officials to receive: *First*, the Court has looked to the nature of the power being exercised in light of the constitutional division of powers. *Second*, the Court has considered the extent to which Congress might have rationally concluded that the best way of meeting a given problem is by creating some ongoing program, which it allows officials of the Executive Branch to "faithfully execute."

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[28] As described in *Field v. Clark,*

> Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do [upon forming a judgment that the named contingency had arisen] was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Id. at 693.

A. *Allocating Tax Burdens Is Peculiarly Within The Competence Of The Legislative Branch And Beyond The Competence Of The Executive Branch.*

Not surprisingly, it is necessary to look at the nature of the power being assigned in judging the constitutionality of any delegation. *See Lichter v. United States*, 334 U.S. 742, 778 (1948) (propriety of delegation depends upon "the nature of the power being delegated"). Scrutiny of Congress' decision to delegate authority is necessarily "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).

In the field of foreign affairs, for example, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 320 (1936). *See also Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 & n.10 (1976); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). In connection with foreign relations and matters incidentally affecting foreign relations, Congress might justifiably conclude that it should not make some important decision because, under the system of overlapping authority set forth in the Constitution, the President can *better* make that decision.[29] The framework of institutional responsibility set forth in the Constitution, making the President the representative of the United States in dealings with foreign governments and authorizing the President alone to negotiate treaties, verifies that conclusion.

No suggestion could be made that the Executive Branch enjoys special competence to set tax rates. The opposite

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[29] *See also The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813) (authority to lift an embargo); *Field v. Clark*, 143 U.S. 649 (1892) (duties on foreign imports); *Hampton* (flexible tariffs); *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (quality of imported teas); *Lichter* (war powers reformation of subcontracts).

is true. And if, as appears to be uniquely true of the tax power, the Constitution not only offers no support for the notion of overlapping substantive authority in the Executive, but appears to associate taxing decisions with the unique characteristics of the legislature, any prerogative Congress might otherwise have to delegate away its authority would have no application to taxation.

Congress cannot justifiably believe that the Executive Branch is better positioned to make the taxing decision because, in the terms in which the Constitution deals, taxing decisions are better made by persons who must hear and respond directly to the democratic will. Constraints on the taxing power that flow from the political accountability of legislators are difficult to transfer through "standards" imposed on the Executive. As Dean Freedman concludes:

> When a constitutionally assigned power is by its nature peculiarly resistant to the formulation of governing principles and standards, the indications become strong that the Framers placed a deep reliance for its proper exercise upon the unique qualities—the institutional competence—of the body to which it was assigned. . . . The power of Congress to levy taxes [is] of this character.

J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 88 (1978).[30]

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[30] Dean Freedman explains the notion of "institutional competence" as follows:

> Congress is the national institution that takes its character most directly from the political responsiveness of its members. In addition, senators and representatives, elected and subject to reelection by states or local constituencies, constitute a legislative institution of broad-based diversity. These characteristics serve to define the unique institutional competence of Congress for purposes of levying taxes.

Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 325 (1976).

The need to assess the nature of the power when evaluating a particular delegation is further illustrated by the distinction between fees and taxes drawn in *National Cable.* A seemingly obvious point overlooked by the Government is that the "fee/tax" distinction, imbued with such significance by the Court in that case, would make little sense if delegation of the taxing power were not to be subject to some more rigorous analysis than was applied in other fields. In distinguishing between fees and taxes, however, the Court in *National Cable* was acknowledging the basic fact that there are certain *types* of decisions the Executive Branch is less *constitutionally* competent to make. Mere "fee setting" encompasses none of the discretionary choices involved in raising revenue. In setting fees, an agency need not decide who is to be charged (only those who receive services may be assessed fees), or more importantly here, how much is to be charged (since fees are set according to the cost of providing the service). By contrast, revenue raising involves a far more judgmental inquiry. An agency that sets out to determine who should pay what in order to fund a program of research, or to finance the salaries of the rulemakers, or to fund grants to the States, involves itself in a far more ambiguous inquiry. Resolution of competing issues of fairness and equity is well suited to the legislative process, as the Framers intended it. However, allocating the burden of taxation among the citizenry—whether on a large or small scale—"carries [the Executive Branch] far from its customary orbit. . . ." 415 U.S. at 341.

National Cable thus implements, specifically in the tax area, the more general principle, long recognized by this Court, that the nature of a power affects the permissible limits of its delegation. *See Lichter, supra*; *Curtiss-Wright, supra.* There are further differences in the taxing power, beyond those invoked in *National Cable*, which explain why the taxing power has not been delegated even as Congress has freely assigned the Executive

broad discretionary authority in other governmental enterprises. As the *quid pro quo* for virtually any delegation to an administrative agency, we demand the right of judicial review, to monitor the agency's actions and ensure its consistency with the legislative intent. Whether that is a good or poor substitute for the right to have an issue determined through the *legislative* process is subject to debate. But in the field of taxation, the right to judicial review is ephemeral because the equitable and subjective nature of the relevant determination renders the ultimate decision virtually unreviewable in a court of law:

> The same discretionary character of taxation that ordinarily shields it from effective judicial review should also make legislative oversight of a delegate difficult. *Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress.*

L. Tribe, *American Constitutional Law* 366 n.15 (2nd ed. 1988) (emphasis added).

Finally, in taking account of the nature of the power to be delegated, this Court has looked to the imperatives of the exercise of a particular governmental power and measured delegations of that power against the basic purposes for which the power was assigned to Congress in the first instance.[31] Thus, in *Lichter v. United States*,

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[31] Although the taxing power may be *sui generis* in this regard, there are one or two other candidates for that conclusion. *See* L. Tribe, *American Constitutional Law* 362 (2nd ed. 1988) ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility"). *See also Wayman v. Southard*, 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given

this Court emphasized that "the primary implication of a war power is that it shall be an effective power to wage the war successfully." 334 U.S. at 782. The broad purpose of the power anticipates innovation in the manner in which Congress may employ it. Even with respect to "ordinary" legislative efforts, addressing common domestic concerns under the Commerce Clause, the breadth of Congress' legislative canvas suggests the need for a similar flexibility in order to make law capable of governing the Nation. The facts and circumstances that Congress seeks to address are not always susceptible to solution by an inflexible statutory rule. Thus, it is not difficult to view an allowance of power to the Executive, to act flexibly and draw balances as they arise, as necessary to implement that type of power.

But in this respect too, the taxing power is dissimilar. The commands of the exercise of that power intuitively suggest a different scope of action, one that is fully within the ordinary competence of a legislative body to address. Taxing decisions were to be made centrally for the whole of the country.[32] And history confirms the absence of any

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to those who are to act under such general provisions, to fill up the details.")

Consider, for example, the power of Congress to impeach and convict a President for "Treason, Bribery, or other High Crimes and Misdemeanors." U.S. Const., art. II, § 4. As Dean Freedman explains:

> The Framers regarded the institution of impeachment as "pre-eminently a political process, likely to agitate the passions of the whole community." It was, as Hamilton wrote in *The Federalist*, "a method of NATIONAL INQUEST into the conduct of public men," best assigned to "the representatives of the nation themselves."

Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-27 (1976) (citations omitted).

[32] Whatever meaning one might attribute to the Uniformity Clause (art. I, § 8, cl. 1), it certainly would not allow for subordinate authorities to apply different rules geared to different balances in different areas of the country.

customary reliance on the subordinate authority of the Executive to allocate the tax burden among the citizenry. There is assuredly nothing about the choice of the formula in this case that suggests that the imperatives of the taxing power demand legislation with a broad brush—and thus a substantive lawmaking role for the Executive in its exercise.[33]

B. *Under Section 7005, The Secretary Has Been Directed To Make A Law And "Faithfully Executes" Nothing.*

In determining whether the exercise of any delegated lawmaking authority is, in truth, the execution of the law, the Court has also considered the nature of the congressional purpose that prompted a grant of authority to the Executive. In approving any number of broad congressional initiatives, this Court has declined to question Congress' decision to assign quasi-legislative authority to executive officials where invalidation of the delegation might have deprived the federal government of the only effective means of exercising the power granted it by the Constitution. Where Congress has chosen to address some concern through the creation of a program that requires a flexible approach to various and varying conditions, the Executive Branch is, of course, the only branch that can properly execute that approach. Implementing that approach is, therefore, by definition, the execution of the law. *See Hampton*, 276 U.S. at 406.[34]

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[33] The fact that a bill was introduced apparently solving this problem, (*see* note 5 *supra*), by adopting the same type of formula the Secretary adopted, only emphasizes the ease with which this determination could have been made by Congress.

[34] *Hampton* described the reason why agencies may set rates for the purpose of regulating commerce:

> Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it

Where such circumstances exist, this Court has limited its inquiry to the question whether Congress has provided an intelligible principle to the Executive to limit, in some way, the Executive's actions. *See Hampton, supra.* An extraordinary range of constitutional scholars have challenged the effectiveness of this standard, however, and have agreed that meaningful limitations on the ability of Congress to assign away its basic lawmaking responsibilities are essential to the maintenance of our representative government.[35] Many of these scholars tend toward the view that the Court's cases have been too lenient in

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would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission . . . to fix those rates . . . . "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic . . . ."

276 U.S. at 407-08 (citations omitted).

[35] *See* J. Ely, *Democracy and Distrust* 131-34 (1980); T. Lowi, *The End of Liberalism*, ch. 5 (2d ed. 1979); L. Tribe, *American Constitutional Law* 362-69 (2nd ed. 1988); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 63-67 (1982); Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-31 (1976); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985); Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and the Delegation of Power*, 72 Nw. U.L. Rev. 443, 454 (1978); Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 584-85 (1972). *See also Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

Of course, there are proponents the other way. The Government cites Mashaw, *ProDelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81 (1985), in support of its position.

applying the "intelligible principle" standard, leaving fundamental policy decisions to administrative agencies.

We proceed from a more fundamental tenet: To declare that *all* facets of *all* legislative power may be delegated subject only to an "intelligible principle" standard —irrespective of the precise legislative function at issue and wholly apart from the broader statutory context in which the delegation is made—is to go well beyond the confines of either "common sense" or the "practical necessities" of government. *Cf. Hampton*, 276 U.S. at 406. In particular, there is no support either in the case law or in the text of the Constitution to support statutes that allow executive officials to make law where the only colorable rationale for that grant of authority is Congress' unwillingness to make a particularly hard choice. On the contrary, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Chadha*, 462 U.S. at 953 n.16 (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

Thus, there is no need to reach the application of the "intelligible principle" standard in this case. The application of that standard always presupposes other conditions. As the Court suggested in *Hampton*, although there will certainly be times when the administration of government requires Congress to invoke the assistance of the other Branches—as when "common sense and the inherent necessities of the governmental coördination" warrant it (276 U.S. at 406)—the Constitution limits such requests for assistance when "the action invoked" involves the "assumption of the constitutional field of action of another branch." *Id.* at 406. The bare instruction to an executive officer to make a decision for which Congress is unwilling to take responsibility cannot, in this sense, be said to be a constitutionally legitimate request for the Executive to implement the law.

In short, in every case in which the Executive Branch has been given substantive discretion to aid in execution of a congressionally established program, there has been a program to execute, rather than merely a decision to make. The existence of those conditions allows the Court fairly to characterize the Executive Branch's exercise of a delegated power as encompassed within the constitutional term, the "faithful execution of the law." This Court has never gone so far as to authorize an unadorned attempt by Congress to relieve itself of the responsibility for a politically sensitive decision, such as allocating the burden of a tax, by passing that decision to the Executive.

C. *Section 7005 Impermissibly Assigns The Decision How To Allocate The Tax Burden To Executive Officials.*

Measured against the foregoing, it strains the Constitution's division of powers to the breaking point to consider the setting of tax rates to be an executive function. Under Section 7005, Congress has disrupted the balance between the Legislative and Executive Branches by assigning a responsibility to executive officers, the allocation of the burden of taxation, that institutionally belongs to Congress. This is so because (1) the task of fixing tax liability is by its nature a task for elected officials which Congress alone can perform, and (2) the assignment of this single, politically sensitive choice to a cabinet officer cannot in any case meaningfully be characterized as "*execution* of the law in constitutional terms." *Bowsher*, 478 U.S. at 732-33 (emphasis added).

This is not a case where "common sense and the inherent necessities of the governmental coordination" have impelled Congress to seek the assistance of the Executive, but is merely an effort to shirk constitutionally imposed responsibilities. Under Section 7005, Congress' breadth of vision did not demand that it describe its objectives in bold strokes, leaving the details to be filled

in as situations and facts presented themselves. *See Field v. Clark*, 143 U.S. at 694; *United States v. Grimaud*, 220 U.S. 506, 516-17 (1910); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Nor is this a case "where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *Lichter*, 334 U.S. at 785. The exigencies of legislating here suggest neither "the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 424 (1944). This is also not a case where, upon the finding of certain facts, or the occurrence of certain contingencies, an executive officer was empowered to act to implement the congressional will. *See Hampton*, 276 U.S. at 407.

On the contrary, what was involved here was the delegation of a choice that has historically been regarded as peculiarly legislative—establishing a formula under which it would be determined who would eventually have to pay what share of the Government's costs. If in Section 7005 Congress had itself set the formula for assessing that tax, fixing the rate, or allocating a given company's share, leaving it to the agency to compute or enforce the assessment established by Congress, there would have been no constitutional problem. Instead, it left the rate decision to the agency. Indeed, as if to confirm the fact that it was leaving a single taxing issue to the agency for decision, Congress presented a multiple choice to the agency about how it might choose to set the formula. The choice was to be the agency's and the agency's alone.

As such, Section 7005 presented a decision that—precisely because it involved taxes, and someone's ox would be gored by the choice of any basis for apportioning those taxes—Congress was unwilling to make itself.[36] That the Framers sought, in the plainest terms, to ensure that

[36] Nothing, of course, prevented Congress from receiving testimony from the agency about the formula the agency viewed as

elected representatives would, in fact, make the taxing decisions, only emphasizes that the escape from accountability embodied in Section 7005 is fundamentally at odds with the constitutional plan. Absent the dressing of an administrative program to conceal it, the delegation to the Secretary of Transporation here stands as a naked delegation of legislative power; the power to make law, without more, cannot also be the execution of the law. Thus, what is starkly at stake is congressional abnegation of its own legislative responsibilities in a uniquely "legislative" area, and the attempt to thrust upon the Executive Branch the very lawmaking power that, by tradition and competence and the terms of the Constitution itself, would extend the Executive well beyond its charter.

Despite trends in that direction,[37] we have not yet reached the point where all regulatory agencies have been charged with the responsibility of finding the means of financing their activities under authority of enactments similar to Section 7005. But just as the "accretion of dangerous power does not come in a day [but rather

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most suitable and then—after opening itself to additional comment by constituents—voting that suggestion into law. The only difference would have been that in *that* case Congress would have been directly and immediately accountable for the decision *it* had made; the way it did it, it avoided that accountability.

[37] Perhaps the most extreme example of Congress' willingness to give broad and unconstrained revenue raising authority to a federal agency is in its delegation to the Federal Energy Regulatory Commission ("FERC"). *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-91. Specifically, Section 3401 gives FERC the power to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." Section 3401(a). The only standard Congress sets forth in the statute to guide FERC's formulation is the instruction that the charges be "fair and equitable." Section 3401(b). The statute also permits FERC to select which entities or classes of entities from among those the agency regulates are to be taxed.

arises] slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority,"[38] the progressive refusal of the Legislative Branch to bear its own constitutional burdens, burdens imposed on the legislature precisely because of its more immediate accountability to the electorate, threatens the foundations of democratic government. That Congress appears to be abjuring its responsibility in increments is no cause for this Court to accept that result. *See* Brief by Amici Curiae Chamber of Commerce of the United States, *et al.* Where, as here, this Court is able to identify in Congress' action the plain avoidance of its constitutional responsibilities, through the assignment of duties to a branch of government that is not empowered to execute those duties, this Court is obliged to reaffirm the constitutional plan.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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January 12, 1989

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[38] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

(8)

No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

WILLIAM C. BRYSON
Acting Solicitor General
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15 pp

TABLE OF AUTHORITIES

Cases: Page

A.L.A. Schechter Poultry Co. v. *United States*, 295 U.S. 495 (1935) 6

American Power & Light Co. v. *SEC*, (1946) 1, 6

Clyde Mallory Lines v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935) 11

Federal Power Comm'n v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 7

Head Money Cases, 112 U.S. 580 (1984) 11

INS v. *Chadha*, 462 U.S. 919 (1983) 4

J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. (1928) 1, 4, 6, 9

Lichter v. *United States*, 334 U.S. 742 (1948) 7

Manhattan General Equipment Co. v. *Commissioner*, 297 U.S. 129 (1936) 4

Mistretta v. *United States*, No. 87-7028 (Jan. 18 1989) 4, 6, 7, 8, 9

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 4, 9

National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979) 5

Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) 4

United States v. *Correll*, 389 U.S. 299 (1967) 5

Yakus v. *United States*, 321 U.S. 414 (1944) 7, 8

Constitution, statutes and regulations:

U.S. Const.:

Art. I 2

Taxing Clause 8

§ 3 3

§ 7, Cl. 1 (Origination Clause) 2, 3, 4

Art. II 2

Amend. XVII 3

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82:

Section 7005, 100 Stat. 140-141 .... 1, 2, 5, 6, 7, 8, 9, 11, 12

26 U.S.C. 7805 5

16 U.S.C. 460*l*-6a 10

19 C.F.R. 24.23 10

	Page
Miscellaneous:	
H.R. 3500, 99th Cong., 1st Sess. (1985)	2
H.R. Rep. No. 89, 97th Cong., 1st Sess., Pt. II (1981)	5
H.R. Rep. No. 300, 99th Cong., 1st Sess. (1985)	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2098

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR THE APPELLANT

We explained in our opening brief why Section 7005 of COBRA (100 Stat. 140-141) is constitutional. Congress's power to tax is subject to no greater restrictions on delegation than are its other legislative powers. See Gov't Br. 10-21. And in any event, the fees that the Secretary of Transportation collects under Section 7005 are not "taxes" in the strict sense used by the Constitution. See Gov't Br. 21-25. We also showed that Section 7005 – which sets forth the amount of fees to be collected, the persons liable for those fees, and the exclusive criteria that the Secretary may consider in establishing reasonable fee schedules – plainly meets this Court's standards for non-delegation. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946); *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928).

1. Appellee contends that Congress's power to tax is unlike its other Article I powers in that Congress may not enact a tax law that calls upon the Executive to make any discretionary judgments.[1] Appellee's argument is not based on the language of Articles I and II of the Constitution; nothing in those articles states that Congress must legislate in the tax area with unique specificity. Rather, appellee resorts to the claim that the "Historical Foundations" of the Origination Clause (Appellee Br. 10) show that Section 7005 is unconstitutional. Appellee's claim is unpersuasive.

The Origination Clause (Art. I, § 7, Cl. 1) provides that "All Bills for raising Revenue shall originate in the House of Representatives." [2] Thus, there plainly is an interplay between Congress's power "to lay and collect Taxes" and the Origination Clause: all tax bills must begin in the House of Representatives. But that is the only respect in which the Origination Clause modifies Congress's power to pass tax laws. Contrary to appellee's suggestion, the Origination Clause says absolutely nothing about the de-

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[1] We noted in our opening brief (Gov't Br. 18 n.10) that, in theory, this Court could create a new and more exacting non-delegation standard for tax laws – one that would allow the Executive to exercise some discretion under tax statutes, but not as much discretion as is allowed in other areas of law. As we anticipated (*ibid.*), however, appellee fails to set forth such a workable standard in its brief. Instead, appellee insists that the Executive may make no policy judgments in the field of taxation.

[2] Section 7005 of COBRA did originate in the House. The House Committee on Energy and Commerce drafted the provision, which was then included in H.R. 3500, 99th Cong., 1st Sess. See H.R. Rep. No. 300, 99th Cong., 1st Sess. 492 (1985). Thus, appellee cannot contend – and we do not understand it to contend – that the law violates the Origination Clause; rather, appellee is arguing that the principle of separation of powers, as informed by the Origination Clause, forbids Congress from giving the Executive discretionary authority in the field of taxation.

gree of specificity required in "Bills for raising Revenue." Indeed, as we explained in our opening brief (Gov't Br. 12-13), the Framers understood that a tax law, like any other act of Congress, could call upon the Executive to use its discretion in executing the statute.

Appellee notes (Br. 12) that the proponents of the Origination Clause wanted the power to tax to rest initially in the House of Representatives because it was more "immediately the representatives of the people" than was the Senate. That observation is true but irrelevant. In the unamended Constitution, the Senate was composed of persons selected by state legislatures. See Art. I, § 3. Not until 1913, with the adoption of the Seventeenth Amendment, were senators directly elected by the people. Accordingly, the clear choice of the drafters of the Origination Clause was that persons elected by the people should have the initial and immediate responsibility over tax matters. See Appellee Br. 12-13.

That constitutional plan was followed in this case. The elected members of Congress—first in the House and then in the Senate—duly considered and then enacted Section 7005. To be sure, Congress has asked for the Executive's help in implementing the statutory directive. But the elected Congress retains plenary control over the schedule of fees adopted by DOT pursuant to Section 7005. Congress may, in its judgment, modify DOT's fee schedule at any time, or amend or repeal Section 7005 altogether. There is no evidence, either in the text of the Constitution or the remarks of the Framers, that the proponents of the Origination Clause thought the people's "immediate representatives" (Appellee Br. 12) in Congress could not ask the Executive to exercise judgment in executing duly enacted tax measures, subject to the ordinary modes of congressional oversight and control. Such a remarkable proposition—one that would set Congress's power to tax

apart from its other broad and important powers—surely would have found its way into some provision in the text or recorded history of the Constitution if that were the Framers' intent.

Appellee and its amici nevertheless contend (Appellee Br. 21-25; Chamber of Commerce Br. 6-8) that Section 7005 circumvents the Origination Clause by allowing tax "laws" to "originate" in the Department of Transportation. That contention amounts to an unsupported attack on all statutes that give discretionary authority to the Executive.[3] There is no doubt that federal agencies and Executive departments may adopt rules of general application without running afoul of the Constitution's procedures for the enactment of laws—*i.e.*, approval by majorities in both Houses and presentment to the President. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). Agencies that adopt such regulations are not making a "law" in the constitutional sense; they are executing Congress's law by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935)). See *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983).[4] Hence, the Secretary of Transportation

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[3] Appellee's claim is also inconsistent with this Court's holding in *J.W. Hampton Jr., & Co.* v. *United States*, *supra*, in which the Court upheld a statute giving the Executive broad authority to set tariffs—a type of tax—on imported goods. The Court in *J.W. Hampton* never suggested that the statute at issue in that case allowed a tax statute to originate with the President instead of the House of Representatives.

[4] We thus agree with appellee's observation (Br. 19) that the Executive does not have the power to make laws in the constitutional sense; it has the "power to adopt regulations to carry into effect the will of Congress" by filling in gaps in a statute. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). Such regulations are not, strictly speaking, the exercise of "legislative power." *Mistretta* v. *United States*, No. 87-7028 (Jan. 18, 1989), slip op. 10.

plainly did not enact a law, requiring the approval of both Houses and the signature of the President, when the Secretary adopted fee schedules under Section 7005.[5]

2. Appellee devotes much of its brief to the claim that Section 7005 "eliminates legislative accountability" (Appellee Br. 21). That suggestion is obviously not correct. Congress enacted Section 7005 in 1986. At that time, Congress established a new fee to pay for pipeline safety programs. Congress directed the Secretary of Transportation to collect those fees from pipeline companies. Congress specified the exclusive criteria that the Secretary could consider in making reasonable fee schedules. And Congress sets the aggregate amount of fees collected each year by passing an appropriations law. Congress is responsible for all those basic decisions. The process required by the Constitution to maintain political accountability was followed in this case; appellee simply does not like the substantive outcome.[6]

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[5] Appellee incorrectly contends (Br. 18-19), that the Treasury Department's ability to promulgate tax regulations (26 U.S.C. 7805) is unlike the rule-making power of other Executive Departments. This Court has ruled that, if the Commissioner of Internal Revenue acts within Congress's mandate, the "choice among reasonable interpretations is for the Commissioner, not the courts." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 488 (1979). Similarly, the Court has upheld IRS rules that "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S. 299, 307 (1967) (upholding regulation defining "travel expenses").

[6] Section 7005 of COBRA was not a novel idea that appeared in 1986 without warning. When Congress authorized appropriations for the two pipeline-safety programs in 1981, members of the House of Representatives noted that Congress should consider whether "the expense of delivering the product safely ought to be borne by the pipeline user, rather than the general taxpayer." H.R. Rep. No. 89, 97th Cong., 1st Sess. Pt. II, at 13 (1981).

Perhaps appellee is truly claiming that Section 7005 reduces Congress's accountability to a point that the Constitution should not permit. But this Court's standards for non-delegation are themselves designed to gauge whether that point has been passed. See generally *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 529-530 (1935). Those standards reflect the understanding that Congress must make fundamental policy choices, and yet often obtain "the assistance of its coordinate Branches." *Mistretta* v. *United States,* No. 87-7028 (Jan. 18, 1989), slip op. 10. Thus, if a statute satisfies the tests for non-delegation found in *American Power & Light* and *J.W. Hampton,*[7] it necessarily follows that Congress did not violate the principle of separation of powers. And it also follows that members of Congress are as politically accountable as the Constitution demands.

b. Appellee repeatedly claims (Br. 8, 45-49) that Congress was "unwilling" to make all decisions regarding Section 7005 fees because congressmen feared adverse political consequences. There is no reason for this Court to accept that characterization of Congress's action. There surely is nothing in the record or the legislative history cited by appellee to support that view. Congress could have rationally decided that the Secretary of Transportation was better situated than it was to make detailed decisions about how the fees should be allocated among pipeline operators. DOT administers the two pipeline safety programs. It is intimately familiar with the program costs made necessary by the activities of the regulated entities. And DOT is the first to know if its administrative programs change in a way that would justify an adjustment of fee schedules. Thus, Congress acted rationally in directing

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[7] Appellee does not question our view (Gov't Br. 26-28) that Section 7005 clearly satisfies those well-established tests.

the Secretary of Transportation to execute Section 7005 by making and, if necessary, adjusting reasonable fee schedules under prescribed criteria.

In *Yakus* v. *United States,* 321 U.S. 414 (1944), the Court upheld a statute giving the Price Administrator the power to fix fair and equitable commodity prices. In *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), the Court upheld a law commanding the Federal Power Commission to determine just and reasonable rates. And in *Lichter* v. *United States,* 334 U.S. 742 (1948), the Court sustained a law that allowed the Executive to recover excess profits earned on military contracts. In all of those cases, Congress could have made additional policy judgments and written more specific laws. But the Court did not suggest that Congress's choice to legislate with a broad brush necessarily showed an "unwillingness" to make difficult decisions. When Congress legislates within the limits of the non-delegation doctrine, this Court does not second-guess the wisdom of the law. Quite simply, " 'Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.' " *Mistretta* v. *United States, supra,* slip op. 18 (quoting *Yakus* v. *United States,* 321 U.S. at 425-426). See also *Mistretta,* slip op. 4 (Scalia, J., dissenting) ("we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

c. Appellee argues (Br. 26-27) that Section 7005 is an unconstitutional delegation of legislative power because it authorizes DOT to collect fees to pay for a part of its budget and therefore relieves Congress of any responsibility for examining DOT's annual budget with care. That argument is wrong on both the law and the facts. DOT may spend only those sums of money that are appropri-

ated by Congress. Thus, each year Congress must examine DOT's budget—including the costs of the two pipeline safety programs—when Congress passes an appropriations law. And contrary to appellee's suggestion, experience under the Act shows that Congress has not given DOT a free reign significantly to increase its costs (and thus the amount of fees collected). As we noted in our opening brief (Gov't Br. 4 n.2), the total federal appropriations for the two programs for fiscal years 1986, 1987, and 1988 were \$7.773 million, \$8.523 million, and \$8.550 million, respectively. Accordingly, there is no basis for believing that Section 7005, which returns to Congress's attention every year as it passes an appropriations law, gives DOT a dangerous and unconstitutional mandate to act without any threat of congressional review.

3. Appellee next argues (Br. 35-49) that Section 7005 is unconstitutional because the authority given to the Secretary is not Executive power. That argument may simply be a restatement of its main point that the Taxing Clause precludes Congress from giving the Executive any discretionary authority in the field of taxation. Alternatively, appellee may be arguing that tax matters necessarily involve policy judgments and such decisions are better left to Congress. But as the Court recently noted in *Mistretta,* this Court's "cases do not at all suggest that delegations of [authority] may not carry with them the need to exercise judgments on matters of policy" (slip op. 17). Accord *id.* at 4 (Scalia, J., dissenting) (noting that the Court is not competent to review the permissible degree of policy judgment that may be left to the Executive). Indeed, the Secretary's policy decisions in this case—which are limited to selecting among prescribed criteria when he writes fee schedules—are most modest when compared, for example, to the Price Administrator's power to fix fair and equitable commodity prices (see *Yakus, supra*) or the

Federal Communication Commission's power to regulate broadcasting in the public interest (see *National Broadcasting Co., supra*).[8]

Moreover, contrary to appellee's contention (Br. 23, 38-39), the power to set tax rates is not unique for purposes of non-delegation. That was made clear in *J.W. Hampton, supra,* where the Court upheld a law giving the President the power to set duties on imported goods. The Court stated, in words that plainly refute appellee's contention, that the "same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise." 276 U.S. at 409.

Appellee nevertheless contends (Br. 43-46) that the Secretary's power under Section 7005 is the "unadorned" power to make law, not the power to make judgments incident to the execution of the law. That argument is foreclosed by *Mistretta* v. *United States, supra,* where the Court upheld a statute that gave the United States Sentencing Commission one job—to make binding sentencing guidelines for the federal courts. Here, by contrast, DOT has many regulatory functions, including the job of administering the two pipeline safety programs. In Section 7005, Congress gave DOT the additional task of collecting fees to pay for those programs. It cannot be said that DOT is exercising "unadorned" lawmaking power any more than the United States Park Service does when it sets fees

[8] Accordingly, there is no constitutional significance to appellee's observation that the Secretary, in implementing Section 7005, must consider "issues of fairness and equity" (Appellee Br. 40). That is true with many other statutes that have been upheld by this Court. See Gov't Br. 10, 28.

for the use of national parks (16 U.S.C. 460*l*-6a) or the United States Customs Service does when it sets fees for processing imported goods (19 C.F.R. 24.23). The fees that DOT collects are part and parcel of its regulatory program.

4. a. We explained in our opening brief (Gov't Br. 21-25) that, even if the Constitution somehow requires Congress to make all judgments regarding taxation, the fees collected under Section 7005 are not "taxes" in the constitutional sense. A law that requires a party to reimburse the government for the costs of a program of regulation made necessary by that party's activities is properly regarded as imposing a "fee" rather than a "tax." Appellee disagrees with that conclusion (Appellee Br. 28-32) but accepts many of its premises. For instance, appellee states that a "fee" is "what the Government charges for services performed" (Br. 30). And appellee argues that "fees are measured by the specific costs that an individual firm imposes on a government agency" (*ibid.*). Appellee then contends, however, that fees must be linked to what are in effect the variable costs associated with the activities of a single firm, and may not include any allocation of fixed costs or agency overhead (*ibid.*). Thus, appellee concedes that the government would be imposing a fee if it charged appellee for the costs of inspecting its pipelines. But appellee contends that the government is imposing a tax in this case because it requires appellee to pay for a portion of governmental costs that are related to more than one pipeline firm—*e.g.*, the costs of setting industry standards.

There is no basis in the Constitution for appellee's limitation on the definition of a "fee." We agree with appellee that a fee is measured by the governmental costs made necessary by a firm's activities. Those costs, however, may properly include a pro rata share of the expenses incurred in developing, setting, and administering the general

standards that are used in regulating the activities of all pipelines. Contrary to appellee's assertion, those general costs are as much the result of appellee's activity as are the specific expenses of inspecting appellee's pipelines. See *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 266 (1935) (exactions collected under law were fees to reimburse governmental costs even though ship owner's "vessels have not been given any special assistance"). As the Court explained in *Head Money Cases*, 112 U.S. 580 (1884), and *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n, supra*, such exactions, which may be regarded as simply a part of appellee's cost of doing business, are properly regarded as a fee.

b. Appellee misunderstands our reliance on *Head Money Cases* and *Clyde Mallory Lines*. As appellee notes (Br. 33-34), those cases do not address the non-delegation doctrine, but they clearly do define the constitutional distinction between "taxes" and "fees." And under the distinction drawn in those cases, the fees collected under Section 7005 are not taxes for the general support of the government. See Gov't Br. 21-23.

Appellee maintains (Br. 31) that, under our view of fees, almost every exaction by the government could be considered a fee and not a tax. That is obviously incorrect. For example, the enormous governmental costs associated with social-welfare programs and defense are clearly paid for by taxes rather than fees. No attempt is made to recover the costs of these programs from those who directly benefit; nor is any attempt made to recover the costs from those whose activities give rise to the need for such programs. We acknowledge that there may be close cases where the distinction between a fee and a tax becomes less certain. But that is not true here. The regulatory costs

created by the activities of appellee and other hazardous liquid pipeline operators are discrete and identifiable. Pipeline operators are required only to pay their fair share of those costs; they are not required to subsidize other governmental programs. Thus, Section 7005 does not impose a "tax" in the strict constitutional sense.

For these reasons, as well as the reasons in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

William C. Bryson
Acting Solicitor General

February 1989

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Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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TABLE OF AUTHORITIES

Cases: **Page**

Buckley v. Valeo, 424 U.S. 1 (1976) 2
Field v. Clark, 143 U.S. 649 (1892) 6
Mistretta v. United States, Nos. 87-7028, 87-1904 (Jan. 18, 1989) .... *passim*
Morrison v. Olson, 108 S. Ct. 2597 (1988) 2
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 5
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 4, 5
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 4
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 7

Constitution and Statutes:

U.S. Const.:

Art. I 2
§ 7 2

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82:

Section 7005, 100 Stat. 140-41 .... *passim*

Other Authorities:

J. Ely, *Democracy and Distrust* (1980) 3
L. Tribe, *American Constitutional Law* (2nd ed. 1988) 4

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SUPPLEMENTAL BRIEF FOR APPELLEE

Pursuant to Supreme Court Rule 35.5, Appellee Mid-America Pipeline Company submits this supplemental brief addressing *Mistretta v. United States,* Nos. 87-7028, 87-1904, slip op. (Jan. 18, 1989), announced six days after Mid-America filed its brief on the merits.

The Court in *Mistretta* did not confront a situation in which the assignment of power to the Executive Branch undermined a specific constitutional command requiring the power to be exercised directly by the Legislative Branch.[1] Thus, unlike this case, where Congress' assign-

[1] *See* Slip op. at 36 ("[t]he text of the Constitution contains no prohibition against the service of active federal judges on inde-

ment of the taxing power to the Executive Branch offends the "words and implications" of the Origination Clause (*Morrison v. Olson*, 108 S. Ct. 2597, 2616 (1988), *quoting Myers v. United States*, 272 U.S. 52, 161 (1926)), *Mistretta* did not involve any deviation from a specific constitutional mandate. *See* Appellee's Brief, Part II. Rather, *Mistretta*'s analysis focused exclusively on the more difficult questions presented when no specific command of the Constitution has been undermined by the law in question and the Court must, therefore, decide the separation of powers question by attributing substance to the Constitution's broad textual assignment of the power faithfully to "execute" the law to one branch, to make law, to another, and to decide cases and controversies, to a third. This issue was discussed in our merits brief, Part III. Application of the factors this Court found decisive in *Mistretta* confirms that, unlike the sentencing guidelines, Congress' effort to assign tax rate-setting power to a federal agency violates the Constitution.

1. *Congress' Attempt to Abdicate Its Constitutional Obligation in Section 7005, By Assigning to Another Branch a Power the Constitution Requires that It Alone Exercise, Threatens to Undermine the Constitutional Allocation of Powers In a Sense More Fundamental Than the Usual Case of Encroachment or Aggrandizement of One Branch at the Expense of Another.* In one important respect, the threat to the constitutional allocation of powers posed by this case differs from that presented in *Mistretta*. Here, we have not so much "the encroachment or aggrandizement of one branch at the expense of the other," (*Mistretta*, slip op. at 20, *quoting Buckley v. Valeo*, 424 U.S. 1, 122 (1976)), as we do the obverse situation—a case of "de-aggrandizement," *i.e.*, legislative

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pendent commissions such as that established by the Act"); *id.* at 49 n.32 ("[t]he textual requirements of Article III that judges shall enjoy tenure and be paid an irreducible compensation . . . are untrammeled by the Act").

abdication.[2] Yet, if anything, Congress' abdication of power in this case presents a greater, and more concrete, constitutional danger than encroachment precisely because it promises to nullify a specific constitutional prescription—that *Congress* make tax law. As Mid-America demonstrated in its brief on the merits (pp. 10-15), in assigning the taxing power to Congress, and in prescribing a specific legislative process to govern its proper exercise, the Framers' intent was to accomplish something far more basic for a government that rested on democratic principles than merely to moderate inter-branch warfare: namely, to ensure that taxing decisions be made by persons immediately accountable to the voters. To allow Congress to abdicate its assigned responsibility for such decisions is to render the Framers' plan ineffectual.

In addition, Congress' attempt to reassign the taxing authority to the Executive presents a danger which the Court in *Mistretta* specifically noted was not posed there—an inappropriate combination of two governmental powers or functions within one Branch.[3] In contrast to

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[2] The danger of legislative abdication (as opposed to aggrandizement) of power is aptly captured by Professor Ely's observation that the basic problem with much contemporary congressional action lies "not in a propensity to make politically controversial decisions without telling us why, but rather in a propensity not to make politically controversial decisions—to leave them instead to others, most often others who are not elected or effectively controlled by those who are." J. Ely, *Democracy and Distrust* 134 (1980).

[3] *See* Slip op. at 29 n.17 ("had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."); *id.* at 32 ("the 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of . . . uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.")

the Sentencing Reform Act, Section 7005 has the direct effect of concentrating in the Executive two governmental functions—executing the law and raising revenue to fund the execution of the law—which, by constitutional design and historical practice, have never been combined in a single Branch. Combining wide discretion in the spending of money with the power to determine the means of raising it removes executive agencies still farther from congressional control—and, therefore, from the practical control of the voting population. Congress' political incentive to control federal spending effectively hinges on the fact that increased governmental expenditure ultimately requires Congress to make the decisions about who will pay the cost. That incentive quickly dissipates, however, when agencies are empowered to make both taxing and spending decisions themselves.[4]

2. *The Department of Transportation Does Not Possess the Sort of Institutional Competence Over Matters of Taxation That Justified the Assignment of Quasi-lawmaking Functions to the Sentencing Commission in Mistretta.* In upholding the Sentencing Commission's authority to promulgate sentencing guidelines, the Court in *Mistretta* noted that the assignment of quasi-lawmaking functions to another branch may be appropriate where the Legislative Branch seeks to draw upon another Branch's "special knowledge and expertise." Slip op. at 34. The special competence of one of the other Branches of government in a certain field may create a constitutional predicate for Congress' assignment of substantive authority to that Branch. *See* Appellee's Brief at 38-39. *See also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *United States v. Curtiss-*

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[4] To be sure, Congress retains significant control over federal spending through the appropriations process. Practically speaking, however, it is a reality of contemporary American government that "the President and the Executive Branch have become preeminent in the all-important process of planning and programming federal expenditures." L. Tribe, *American Constitutional Law* 257 (2nd ed. 1988).

Wright Export Corp., 299 U.S. 304, 320 (1936). As demonstrated in Mid-America's brief on the merits, however, taxation is a governmental prerogative that always has been "thought of as the *exclusive* constitutional province of [] one Branch." *Mistretta*, slip op. at 29 (emphasis added). Unlike the Judicial Branch's institutional competence to make discretionary judgments in the field of sentencing (*Mistretta*, slip op. at 34)—an area which is and always has been "a peculiarly shared responsibility among the Branches" (*id.* at 29)—taxation is "a legislative function" that "carries [the Executive Branch] far from its customary orbit." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340, 341 (1974). In short, in asking the Secretary of Transportation to select an "appropriate" tax rate to impose upon the pipeline industry, Congress is plainly not "calling upon the accumulated wisdom and experience of [another] Branch in creating policy on a matter uniquely within [its] ken. . . ." *Mistretta*, slip op. at 51.[5]

3. *Congress' Instruction to the Secretary of Transportation in Section 7005 to Set Tax Rates Cannot Meaningfully Be Said to Be the "Execution of the Law."* The Court in *Mistretta* upheld the Sentencing Reform Act for the additional reason that the statute is a classic example of a delegation "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Slip op. at 11.[6] As such,

[5] The Executive Branch's claim to expertise allowing it to make rules governing the means of *collecting* a tax would obviously rest on a far firmer foundation than a claim of entitlement to allocate the tax burden by setting the rate.

[6] As the Court explained, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." Slip op. at 18.

Mistretta falls within a long line of cases (*see* Appellee's Brief at 43-49) in which the Court has upheld delegations of authority where "[a] practical construction of the Constitution" requires Congress "to invest [another Branch] with large discretion in matters arising out of the execution of statutes. . . ." *Field v. Clark*, 143 U.S. 649, 691 (1892). No such justification is available here. Rather, Section 7005 involves an assignment to the Secretary of Transportation of a single decision—the selection of a formula. This is plainly not a case where Congress has asked a federal agency to oversee or administer a regulatory program involving multiple decisions, all closely related to one another, that requires expert administrative judgment on a case-by-case basis over time. The Secretary of Transportation is not simply "filling up details," but determining the only issue of moment. In short, quite unlike Congress' reliance on an expert sentencing commission to administer the task of promulgating sentencing guidelines for the federal courts, here there is no program faithfully to execute, only an unpopular taxing decision to make.

4. *The "200-Year Tradition of Extrajudicial Service" Relied Upon By the Court in Mistretta To Warrant Judicial Participation in the Sentencing Commission's Activities Stands in Contrast to Congress' Historic Commitment to Making Tax Law Itself.* Finally, in *Mistretta*, the Court noted that a "200-year tradition of extrajudicial service. . . ," (slip op. at 39), provided vital confirmation for the constitutional legitimacy of permitting federal judges to sit on the Commission and to participate in its quasi-legislative mission of promulgating sentencing guidelines. That same 200-year history warrants just the opposite conclusion in this case. As we demonstrated in our initial brief (pp. 16-19), at the same time as Congress has shown its willingness to grant quasi-legislative authority to the Executive Branch in other fields, Congress has carefully refrained from any similar

delegation in matters of taxation. In particular, and despite the otherwise broad grant of authority conferred upon the Secretary of the Treasury to *interpret* revenue laws through the promulgation of regulations, Congress has always taken care to keep to itself the delicate task of allocating the tax burden among the people. Thus, if "'traditional ways of conducting government . . . give meaning' to the Constitution," (*Mistretta*, slip op. at 39, *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (concurring opinion)), Congress' historic practice confirms that the setting of tax rates is not properly part of the execution of the law.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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No. 87-2098 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV
SECRETARY OF TRANSPORTATION,
Appellant

v.

MID-AMERICA PIPELINE COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF OF NATIONAL TAXPAYERS UNION, NATIONAL ASSOCIATION OF MANUFACTURERS, CITIZENS FOR A SOUND ECONOMY, CONSUMER ALERT, AND AMERICANS FOR TAX REFORM AS AMICI CURIAE IN SUPPORT OF APPELLEE

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14PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
Section 7005 of COBRA Unconstitutionally Delegates the Power to Impose Taxes	4
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

A Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 8
Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976) 5
Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985) 9
Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976) 5
Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974) 5
Flint v. Stone Tracy Co., 220 U.S. 107 (1911) 8
McCray v. United States, 195 U.S. 27 (1904) 8
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 7
Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), *cert denied,* 444 U.S. 1102 (1988) 9
National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976) 5
National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974) 3, 5, 9
National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094 (D.C. Cir. 1976) 5
New England Power Co. v. U.S. Nuclear Regulatory Commission, 683 F.2d 12 (1st Cir. 1982) 9
Sohio Transportation Co. v. United States, 766 F.2d 499 (Fed. Cir. 1985) 9
United States v. Kahriger, 345 U.S. 22 (1953) 8
Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) 8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. Art. I, § 7, cl. 1 8
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272:
Section 7005, 100 Stat. 140, 49 U.S.C. App. § 1682a .... passim
Section 7601, 100 Stat. 146, 42 U.S.C. § 2213 .. 6
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Section 3401, 100 Stat. 1890, 42 U.S.C. § 7178 6

Page

MISCELLANEOUS:

51 Fed. Reg. 25,782, 46,978 (1986) 4

Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1981) 9

Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 9

Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978) 7, 8, 9

Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harvard L. Rev. 439 (1980) 9

Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223 (1984) 9

Tribe, *American Constitutional Law* (2d ed. 1988) . 9

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BRIEF OF NATIONAL TAXPAYERS UNION, NATIONAL ASSOCIATION OF MANUFACTURERS, CITIZENS FOR A SOUND ECONOMY, CONSUMER ALERT, AND AMERICANS FOR TAX REFORM AS AMICI CURIAE IN SUPPORT OF APPELLEE

National Taxpayers Union ("NTU"), National Association of Manufacturers ("NAM"), Citizens for a Sound Economy ("CSE"), Consumer Alert, and Americans for Tax Reform ("ATR") submit this brief as *Amici Curiae* in support of Appellee Mid-America Pipeline Company. All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

INTEREST OF AMICI CURIAE

The National Taxpayers Union, Citizens for a Sound Economy, Consumer Alert, and Americans for Tax Reform are nonprofit organizations dedicated to the promotion of economically sound and just government policies in the public interest. NTU, with 150,000 members nationwide, focuses on tax policy, among other issues, as does ATR. Consumer Alert, with 6,000 dues paying members in 50 states, focuses on consumer interest in a broad range of issues, including tax policy questions. CSE, with 250,000 members nationally, focuses on the public interest in a strong, growing economy, which centrally involves tax and budget policies.

The National Association of Manufacturers of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. As a tax exempt business organization, NAM represents its constituency on public policy issues, including tax matters, at the Congressional level. The members of NAM may be directly affected by charges imposed by administrative agencies such as the challenged fee imposed by the Department of Transportation ("DOT"). NAM members already bear a heavy burden in paying corporate income taxes that should support the budgets of regulatory agencies.

All the *amici* work to hold legislators publicly accountable for their positions on tax policy issues. Legislators can evade such accountability, however, if they are allowed to delegate the power to impose taxes to unelected officials. This practice effectively deprives organizations like the *amici* of the ability to perform their functions, and undermines the effectiveness and integrity of the democratic process generally. The *amici* consequently urge this Court to affirm the decision of the court below holding delegation of the power to tax unconstitutional.

SUMMARY OF ARGUMENT

SECTION 7005 of the Consolidated Omnibus Budget Reconcilation Act of 1985 ("COBRA"), 49 U.S.C. App. 1682a, directs DOT to impose annual charges on pipeline operators to fund Federal pipeline safety programs. While the criteria by which these charges are to be determined may seem concrete and specific, as a practical matter they leave DOT with virtually unfettered discretion to determine who among the pipeline operators shall pay any significant tax and how much each shall pay. The fees imposed by DOT under Section 7005 clearly do not comply with the standards for delegated fees established by this Court in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974).

The legal standards the government argues should be applied to this case would leave no meaningful limitation on delegation of the taxing power. Allowing delegation of the power to tax would enable elected officials to evade democratic accountability for the exercise of this power, and seriously undermine control over taxation through the democratic process. The Framers recognized this potential problem and therefore carefully and expressly provided that Congress is to exercise the power to tax through a prescribed process. The delegation of the taxation power in this case should consequently be found unconstitutional and the decision of the lower court affirmed.

ARGUMENT

SECTION 7005 OF COBRA UNCONSTITUTIONALLY DELEGATES THE POWER TO IMPOSE TAXES

This case presents the issue of whether Congress can delegate the power to tax to unelected agency officials. Section 7005 of COBRA directs DOT to impose annual charges on pipeline operators to fund federal pipeline safety programs. The Section provides that DOT is to set the amount of the charges "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas or hazardous liquid pipelines." Section 7005(a)(1).[1]

While these criteria may seem concrete and specific, the Magistrate for the court below found that as a practical matter they left DOT with virtually unfettered discretion to set the amount of the charges to be paid by each pipeline company. Jurisdictional Statement at 9a-10a. The amount of the charges for each company would vary dramatically depending on whether the charges were based on volume-miles, miles, or revenues. *Id.* Indeed, with the statutory authority to set the charges based on any combination of these factors, the Magistrate found that DOT effectively has the discretion to impose any burden on individual companies "from 0-100%" of the total fees to be collected. *Id.* DOT, therefore, effectively has the discretion to determine who among the pipeline operators shall pay any significant tax and how much each shall pay. The Magistrate concluded:

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go a step further and collect such taxes.

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[1] DOT has chosen to impose the charges on the basis of total pipeline miles operated by each company. 51 Fed. Reg. 25,782, 46,978 (1986)

Jurisdictional Statement at 10a.

The DOT fees clearly do not comply with the standards established by *National Cable*, which distinguish true user fees from taxes. *National Cable* required delegated fees to charge only for specific services providing specific direct benefits individually to each feepayer, benefits "not shared by other members of society." 415 U.S. at 340-341. The amount of such fees are to be limited to the cost of providing such specific, direct services. The DOT fees, however, do not charge for the costs of providing specific services individually benefitting each feepayer. Rather, the fees charge for the costs of Federal pipeline programs which provide broad benefits to the general public, such as safety and public regulation of pipelines. The DOT fees finance management, overhead and administrative costs of the pipeline programs, the costs of funding state grants, the cost of collecting the charges, the costs of bringing civil and criminal prosecutions against pipeline companies, and other costs of the programs. These costs have no relation to any benefit conferred on pipeline operators, and are to be apportioned among them in just about any way that DOT sees fit. The DOT fees, therefore, are clearly taxes rather than fees under *National Cable* and following cases.[2]

The government argues that such delegations of the power to tax are permissible. It says that Congress simply has to announce a general policy, designate the part of the Executive Branch that is to implement it, and set out the boundaries of the Executive's authority. Brief for the Appellant at 6. Under this approach, Congress could delegate to the Internal Revenue Service the power to raise taxes to balance the budget each year, subject merely to limitations such as "the tax burden

[2]*See, e.g.* Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974); National Cable Television Association v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir 1976).

assessed to be reasonably related to ability to pay" or "taking into account likely impacts on the economy", or "the tax shall be assessed based on the taxpayer's income, property, or consumption, or an appropriate combination thereof."[3]

When Congress grants such power to impose broadly discretionary taxes to a federal agency, as in this example or in the case of the DOT fees, fundamental concerns are raised regarding the operation of our democratic process. Senators and Congressmen can avoid democratic accountability if they can delegate the power to tax to unelected officials under the cover of vague generalities. Each of the *amici* is heavily involved in efforts to hold elected officials accountable on tax issues, and can see the impact such delegation would have on their own activities. Holding a legislator accountable requires making voters aware of what the legislator has voted for and against and how that affects them. But such an effort can be shortcircuited if a Senator or Congressman can claim that he or she has simply voted for "fairness" and other generalities in the authorizing legislation, and that the taxes were imposed by a remote agency over which the legislator has no direct control. When the agency has the discretion to choose both who is to be subject to the tax and the amount to be assessed, the opportunity for legislators to deny responsibility is even greater.

The activities of Americans for Tax Reform offer a specific example of the problem. ATR conducts a nationwide Pledge

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[3] Indeed, Congress has already enacted other broad, open-ended delegations of the power to impose charges. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Section 7601, 100 Stat. 146, 42 U.S.C. § 2213 (delegating the power to impose fees to the Nuclear Regulatory Commission) and the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Section 3401, 100 Stat. 1890, 42 U.S.C. § 7178 (delegating the power to impose fees to the Federal Energy Regulatory Commission). The precedential effect of the decision in this case must be carefully weighed. If the appellant prevails, Congress may take that result as a signal that it may enact many more, possibly even more open-ended fee delegation statutes to circumvent the difficult process of enacting tax legislation. This would undermine even more seriously democratic accountability and control over the power to tax.

campaign each election year, asking Congressional candidates to pledge not to vote to raise taxes if elected. Hundreds of candidates, both Democrats and Republicans, took the Pledge in 1986 and 1988. But members of Congress can evade the Pledge if they can delegate the power to tax to Federal agencies while disclaiming responsibility for raising taxes. Explaining to the public who should be held accountable in this case and why, and overcoming the legislator's own denial of responsibility, may be impossible. In any event, such an explanatory effort is much more difficult and expensive than communicating that an official has directly voted to increase taxes in violation of the Pledge, in a recorded vote which cannot be denied.

The issue is not merely a matter of the ability of the *amici* to perform their functions. The public interest lies in maximizing the control of the voters over the critical legislative power of taxation. The only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions regarding taxation. As Chief Justice John Marshall wrote in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819),

> The security against the abuse of this power [of taxation] is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

See also Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 85-88 (1978). Allowing legislators to grant to others the power to impose taxes places an undue burden on the operation of the democratic process and substantially weakens democratic control over the critical taxation power.

This weakening of democratic control is of particular concern when dealing with the power to tax. The very founding of our nation grew out of the insistence of our people

on democratic control over taxation. As Professor James Freedman has written:

> The power to tax is surely one of the most important of the legislative powers created by the Constitution. In the history of other nations, as the Framers had good reason to know, the power to tax had proved strikingly susceptible to oppressive application and abuse .... Rhetoric decrying taxation without representation was a part of the Framers' revoluntary heritage, affording them particular cause to construct protections against the possibility that such a momentous power might come to be exercised by small numbers of men in dark ministries. The decision of the Framers to place the power to impose taxes in the legislative branch of government was a response to these considerations.

Id. at 85. Indeed, the Constitution provides that all tax bills shall originate in the House of Representatives, the body closest to the people. U.S. Const. Art. I, § 7, cl. 1. The Framers consequently indicated precisely their desire to maintain democratic accountability and control over the power to tax and their expectation that all taxation would be imposed by a specific Congressional process, not by delegation.

A recognition of the primary role of democratic processes in controlling taxation likewise underlies the judiciary's traditional reluctance to interject itself into taxation questions. "[T]he responsibility of the legislature is not to the Courts, but to the people by whom its members are elected." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869). See also *McCray v. United States*, 195 U.S. 27 (1904); *A Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *United States v. Kahriger*, 345 U.S. 22, 28 (1953). The remedy for unwise or oppressive taxation "is in the ability of the people to choose their own representatives ..." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 169 (1911). Administrative agency control over taxation, like judicial control, presents the danger of removing accountability from elected representatives.

As a result of these considerations, numerous courts and commentators have suggested that open ended delegations of the power to tax would be unconstitutional.[4] The view of these authorities is essentially that the power to impose charges unrelated to benefits is inherently too broad and without meaningful standards or limitations to be validly delegated.

But even if delegation of the power to tax is not per se unconstitutional, statutes attempting to delegate the critical power to impose taxes should be required to include stricter standards and more limited discretion than other delegations. Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439, 443 (1980). Delegations of fee-setting authority which do not meet the *National Cable* standards, or allow the delegatee broad discretion to determine who shall pay and how much, should be unconstitutional.

Indeed, the usual standards for a permissible delegation should be sufficiently strong to prohibit delegations of broad discretion allowing the choice of who shall pay taxes and how much. Guarding against open-ended delegations is critical to protecting our nation's liberties and democratic system of government. However, if the delegation doctrine is to perform this important function, delegations can only be allowed when the Congress provides truly meaningful standards circumscribing the delegated power, not vague platitudes. Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134 (1980); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L.Rev. 1 (1981); Freedman, *Crisis and Legitimacy*, *supra*, p. 7, at 78-94; Tribe, *supra*, n.5, § 5-17, at 362-369.

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[4] *National Cable*, 415 U.S. at 340; Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722,725 (D.C. Cir. 1985); Sohio Transportation Co. v. United States, 766 F.2d 499,503 (Fed. Cir. 1985); New England Power Co. v. U.S. Nuclear Regulatory Commission, 683 F.2d 12,14 (1st Cir. 1982); Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1988); Tribe, American Constitutional Law, § 5-17, at 366, n.15 (2d ed. 1988); Freedman, *Crisis and Legitimacy*, *supra*, p. 7, at 88.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

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BRIEF OF FLORIDA POWER & LIGHT COMPANY, et al. AS AMICI CURIAE IN SUPPORT OF APPELLEE

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21 pp

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Section 7005 of COBRA is One of Many Recently Enacted Statutes That Delegate the Power to Impose Charges, and This Case Should Be Decided in That Context 4

II. Section 7005 Unconstitutionally Delegates to DOT the Power to Impose Arbitrary, Open-ended Taxes 9

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Brock v. Washington Metropolitan Area Transit Authority, 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987) 9
Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir 1976) 9
Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985) 12
City of Vanceburg v. FERC, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) 9
De Bartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, U.S. , 108 S.Ct. 1392 (1988) 7
Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976) 9
Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974) 9
Florida Power & Light Company v. United States, 846 F.2d 765 (D.C. Cir. 1988) 2, 7, 14
In re Jenny Lynn Mining Co., 780 F.2d 585 (6th Cir.), *cert. denied*, 106 S.Ct. 3276 (1986) 9
Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980) 7
Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129 (1936) 14
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 12
Mississippi Power and Light Co. v. NRC, 601 F. 2d 223 (5th Cr. 1979), *cert. denied*, 444 U.S. 1102 (1980) 10, 13
National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976) 9
National Cable Television Association v. United States, 415 U.S. 336 (1974) .... passim
National Cable Television Association v. FCC, 554 F.2d 1094 (D.C. Cir. 1976) 9
Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) 9
New England Power Co. v. U.S. Nuclear Regulatory Comm'n, 683 F.2d 12 (1st Cir. 1982) 12-13

Page

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 15
Schechter Poultry Co. v. United States, 295 U.S. 495 (1935) 15
Sohio Transportation Co. v. United States, 766 F.2d 499 (Fed. Cir. 1985) 12
Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (per curiam), *aff'd sub. nom. Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181 (1986) 7, 14

CONSTITUTIONAL AND STATUTORY REQUIREMENTS:

U.S. Const.
Art. I, § 7, cl.1 .... 11, 12
Art. I, § 8, cl.1 11

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272:
Section 5002, 100 Stat. 117, 47 U.S.C. §§ 156, 158 8
Section 7005, 100 Stat. 140, 49 U.S.C. App. § 1682a .... passim
Section 7601, 100 Stat. 146, 42 U.S.C. § 2213 .... 2-3, 6-7, 10
Section 13031, 100 Stat. 308, 19 U.S.C. §58c 8

Independent Offices Appropriation Act of 1952, Pub. L. No. 97-258, 65 Stat. 290, 31 U.S.C. § 9701 7

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509:
Section 3401, 100 Stat. 1890, 42 U.S.C. § 7178 .... 8-9, 10

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203:
Section 5601, 101 Stat. 1330-275, 42 U.S.C. § 2213 6
Section 10511, 100 Stat. 1330-446, 26 U.S.C. § 7801 8

MISCELLANEOUS:

H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985) 11
51 Fed. Reg. 22,082 (1986) 6
51 Fed. Reg. 25,782, 46,978 (1986) 4
10 C.F.R., Part 170 (1988) 2, 6

Page

Aranson, et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1981) 15

5 Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* (2nd ed. 1987) 12

Ely, *Democracy and Distrust, A Theory of Judicial Review* (1980) 15

Farrand, *The Records of the Federal Convention of 1787* (1889) 11

The Federalist No. 10 12

The Federalist No. 5 12

Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978) 12, 13, 15

Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307 1976) 12

Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1984) 15

Tribe, *American Constitutional Law* (2d ed. 1988) 13, 15

Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439 (1980) 14

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BRIEF OF FLORIDA POWER & LIGHT COMPANY, et al. AS AMICI CURIAE IN SUPPORT OF APPELLEE

Amici Curiae Florida Power & Light Company, et al.[1] submit this brief in support of Appellee Mid-America Pipeline Company, respectfully urging this Court to affirm the decision in *Mid-America Pipeline Company v. Dole*, No. 86-C-815E, slip op. (N.D. Okla. August 5, 1987). All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

[1] In addition to Florida Power & Light Company, *amici* include Arkansas Power & Light Company, Baltimore Gas and Electric Company, Consolidated Edison Company of New York, Inc., Consumers Power Com-

(Footnote continued on following page)

INTEREST OF AMICI CURIAE

Amici Florida Power & Light Company, et al. are 29 electric utilities owning or operating nuclear power plants across the United States. The interest of *amici* in this matter arises from the fact that the Nuclear Regulatory Commission ("NRC") imposes very substantial annual charges on each of the nuclear power plants operated by *amici* and other utilities.[2] These charges raise many of the same issues as the Department of Transportation ("DOT") "fees" at issue in *Mid-America Pipeline.* The fee-setting authority claimed by the NRC is at least as open-ended and discretionary as the fee-setting power of DOT challenged in *Mid-America Pipeline*, and, therefore, raises the concerns about delegation of the taxing power expressed by this Court in *National Cable Television Association v. United States*, 415 U.S. 336 (1974).

In *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988), the utilities sought to invalidate the NRC charges on the grounds that (i) Section 7601 does not authorize the broad based fees imposed by the NRC,[3] or (ii) if

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pany, Duquesne Light Company, Georgia Power Company, Houston Lighting and Power Company, Illinois Power Company, Indiana Michigan Power Company, Iowa Electric Light and Power Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Kansas Gas and Electric Company, Louisiana Power & Light Company, Northern States Power Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, Power Authority of the State of New York, Southern California Edison Company, System Energy Resources, Inc., The Cleveland Electric Illuminating Company, The Toledo Edison Company, TU Electric, Union Electric Company, Washington Public Power Supply System, Wisconsin Electric Power Company, Wolf Creek Nuclear Operating Corporation, and the Yankee Atomic Electric Company.

[2] The charges are imposed by regulations (10 C.F.R. Part 170 (1988)) purportedly issued pursuant to Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 2213. For fiscal year 1988 these fees totaled $124 million.

[3] The utilities contend that under the principles of statutory interpretation followed in *National Cable* and subsequent cases, Section 7601 of COBRA cannot be interpreted as authorizing the particular fees the NRC has imposed on the utilities.

the charges are consistent with Section 7601, then the Section unconstitutionally delegates the power to tax to the NRC. The District of Columbia Circuit, in a 2-1 decision, upheld the NRC charges, and a petition by the utilities for a writ of certiorari to review that decision is presently pending before this Court. *Florida Power & Light Company v. United States*, No. 88-234 (August 10, 1988).

SUMMARY OF ARGUMENT

Besides the statute providing for the DOT fees at issue in this case, Section 7005 of COBRA, 49 U.S.C. App. § 1682a, Congress has recently adopted other statutes that delegate the power to impose charges to administrative agencies, conferring on the agencies broad discretion to determine both who is to be subject to the charges and how much each shall pay. These charges are intended, moreover, to recover the costs of providing broad benefits to the general public, rather than the costs of specific services individually benefitting each feepayer. The present case should be decided in the context of this broader policy trend.

Section 7005 directs DOT to impose annual charges on pipeline operators to finance the cost of Federal pipeline safety programs. As a practical matter, the statutory criteria by which these charges are to be set provide no meaningful constraint on the discretion of DOT to choose who among the pipeline operators shall pay any significant tax and how much each shall pay. Under *National Cable* and its progeny, these charges are clearly taxes and not user fees.

The government's position in this case would leave no effective restriction on delegation of the power to tax. Allowing such open-ended delegations would seriously undermine control over taxation through the democratic process, eliminating the direct accountability of elected officials for the exercise of this critical power. The Framers recognized that the only way to assure that the taxing power is not abused is to require that

those most directly accountable through the democratic process make the decisions regarding taxation. They consequently provided that Congress is to exercise the power to tax through a prescribed process.

SECTION 7005, therefore, should be struck down as an unconstitutional delegation of the power to tax. Moreover, even if delegation of the taxation power is not per se unconstitutional, the standards of Section 7005 are too open-ended to allow this delegation to stand.

ARGUMENT

I. Section 7005 of COBRA is One of Many Recently Enacted Statutes That Delegate the Power to Impose Charges, and this Case Should Be Decided in that Context.

In recent years, Congress has increasingly delegated to administrative agencies the power to impose charges on some or all of the entities under each agency's jurisdiction. These delegations grant the agencies overly broad, open-ended discretion to determine who among their subjects shall pay the charges and how much each shall pay. Furthermore, while these statutory provisions are adopted under the guise of "user fees," the charges are generally assessed to recover the costs of providing broad benefits to the general public, rather than the costs of specific services individually benefitting each feepayer.

A. *The DOT Fees*

SECTION 7005 of COBRA delegates to DOT the power to impose annual charges on pipeline operators to recover the costs of Federal pipeline safety and enforcement programs. The Section confers on DOT the discretion to devise a schedule of such charges "based on the usage [of pipelines], in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof." [4]

[4] DOT chose to impose the charges on the basis of total miles of pipeline operated by each company, primarily because this option was "simple to administer." 51 Fed. Reg. 25,782, 46,978 (1986).

The court below found that this statutory directive provides no significant constraint on the discretion of DOT to structure the fees. Depending on which option or combination of options DOT chooses, the Department can determine who among the pipeline operators shall have to pay the fees and how much each will have to pay, subject only to the limit that total fees must equal the cost of the pipeline program.

For example, the court found that if DOT based the fees solely on pipeline miles, then Mid-America Pipeline Company would have to pay 28.3% of the total funds to be raised. Jurisdictional Statement at 9a. If the fees were based instead on volume-miles, however, then Mid-America's share would be only 5% of total charges. *Id.* And if the fees were based on gross revenues, then Mid-America would pay 12.2% of the total fees. *Id.* Similarly, for another pipeline operator, the Colonial Pipeline Company, the court found that if DOT based the fees on pipeline miles the company would pay 18.5% of the total fees. But if DOT based the fees on volume-miles, Colonial's share would increase to 70.9% of the fees. And if DOT based the fees on gross revenues, then Colonial would pay 49.4%. *Id.* The court concluded that with the statutory authority to choose any combination of these standards, DOT is free to develop fee structures that would result in the assessment on individual companies of almost any amount "from 0-100%" of the total fees. Jurisdictional Statement at 10a. In effect, therefore, DOT has the discretion to determine who among the pipeline operators shall pay any significant fee, and how much each shall pay.

The DOT fees are assessed to recover the costs of Federal pipeline programs that provide broad benefits to the general public concerning safety and other regulatory interests. The fees finance management, overhead and administrative costs of the pipeline programs, the costs of funding a grants-in-aid program for the states, the costs of collecting the charges, and the costs of bringing civil and criminal prosecutions against

pipeline companies. The fees, therefore, do not charge for the cost of specific services individually benefitting each pipeline operator.

B. *The NRC Fees*

These same characteristics are found in other recent statutory provisions as well. For example, under Section 7601 of COBRA, which provides for the NRC fees, the Commission has effectively assumed the discretion to determine who is to be subject to the fees. While the Section states that the fees are to be exacted from NRC "licensees", the NRC has imposed the fees solely on those owning and operating nuclear power reactors, excluding all other Commission licensees.[5] But given the statutory mandate to impose fees on NRC "licensees," the Commission could just as arbitrarily decide later to apply the fees to any of the licensees currently exempted, or to exempt any of those currently assessed. Indeed, the proposed rule providing for the fees published by the NRC for comment would have included major materials licensees among those charged (51 Fed. Reg. 24,082 (1986)), but the final rule excluded those licensees without explanation (10 C.F.R. Part 170 (1988)).

Moreover, as to the amount of the fees, Section 7601 guides the NRC with only vague, open-ended criteria, *i.e.*, that the fees "shall be reasonably related to the regulatory service provided" and "fairly reflect the cost to the Commission of providing such service." These criteria, applied without reference to the *National Cable* standards, have proved to be meaningless. *See Florida Power & Light Company v. United States*, No. 88-234, Petition for Writ of Certiorari at 17. Indeed, Section 7601 does not even fix the total amount of fees to be recovered. It merely establishes a ceiling of 33% of the total NRC budget less other fees collected by the agency.[6]

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[5] Excluded entirely from the NRC annual charges are major nuclear materials licensees (including large uranium processing operations), nuclear power related vendors, small materials licensees, and research reactor licensees, which in terms of numbers represent a majority of NRC licensees.

[6] That ceiling was changed to a floor of 45% under Section 5601 of the Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 2213.

Once again, therefore, the Section delegates the power to determine both who shall be subject to the fees and how much each shall pay.

In addition, the NRC fees, like the DOT fees, also charge for programs and activities serving broad interests of the general public, such as public health and safety. They are imposed to recover the general costs of regulation or of activities supporting regulation. Indeed, most of the funds raised finance research that the NRC has described as "promot[ing] a rise in the general level of knowledge." *Id.* at 4. Moreover, instead of calculating the fees on the basis of costs for specific services for each utility, the NRC imposed a uniform, per capita fee.[7]

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[7] There are, of course, differences in detail among the statutes, which raise different aspects of the fee delegation question. For example, the utility licensees in *Florida Power & Light* contend that Section 7601 cannot be interpreted as authorizing the particular fees imposed by the NRC. Reflecting concern over the constitutional validity of delegations of the power to tax, this Court in *National Cable* adopted a rule of interpretation that applies to all fee delegation statutes — absent language expressly delegating the power to impose taxes unrelated to benefits received, the fees can charge each beneficiary only for the costs of specific services providing discrete benefits to that beneficiary. Because Section 7601 contains no more of a clear and express statement delegating the power to tax than does the statute interpreted in *National Cable* — the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 9701) — Section 7601 must be implemented in accordance with the *National Cable* standards. Since the NRC fees do not comply with these standards, they should be struck down.

Although the courts have not frequently found statutes unconstitutional on delegation grounds, they have more often in recent years relied on delegation concerns to narrowly interpret statutes, as in *National Cable* and as requested in *Florida Power & Light*. *See, e.g.*, Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980). *See also*, Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C.) (per curiam) ("The Court has continued to use the [delegation] doctrine, however, in an interpretative mode, finding that statutory texts conferring power on the executive should be construed narrowly where broad construction might represent an unconstitutional delegation"), *aff'd on other grounds sub. nom.* Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3187 (1986); DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, U.S. , 108 S.Ct. 1392, 1397 (1988) (Court will construe statutes to avoid constitutional problems, unless such construction is plainly contrary to the intent of Congress).

C. *The FERC Fees.*

Another statute, Section 3401 of the Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 7178, grants to the Federal Energy Regulatory Commission ("FERC") the power to impose charges to recover the costs of all of its programs and activities.[8] This Section grants FERC complete discretion to determine who among those it regulates shall be subject to the fees. Moreover, FERC is to determine the amount of the fee on the basis of any "methods that the Commission determines by rule to be fair and equitable." Section 3401(b). Therefore, like the DOT and NRC fee statutes, Section 3401 delegates to FERC the power to determine who is to be subject to the fees and how much each is to pay. The fees, moreover, charge for the broad benefits to the public provided by the agency, rather than solely for specific benefits provided individually to the feepayers.[9]

The present case should be decided in the context of this broader policy trend. The DOT fees are but one example of a growing number of fee-setting delegations. The combined impact of these delegations dilutes democratic accountability and control over the taxation power. Moreover, reversal of the decision below may be taken as approving a wide range of possible fee delegations, and may be seen y Congress as

[8] The FERC fees are under challenge in Interstate Natural Gas Ass'n of America v. FERC, Nos. 87-1570, et al. (D.C. Cir. filed Oct. 9, 1987) and Mid-America Pipeline Co. v. FERC, No. 87-C-571E (N.D. Okla. filed July 20, 1987).

[9] In other recently enacted fee statutes, Congress has shown that it can specifically instruct an agency both whom to assess and how much, setting out detailed fee schedules right in the statute. Section 5002 of COBRA, 47 U.S.C. §§ 156, 158 (providing for fees to be charged by the Federal Communications Commission); Section 13031 of COBRA, 19 U.S.C. § 58a (providing for fees to be charged by the U.S. Customs Service). In Section 10511 of the Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. § 7801, Congress specified the average fees to be charged by the Secretary of the Treasury to recover certain costs of the Internal Revenue Service, with fees to vary only by the amount of work necessary to fulfill requests by feepayers specifically identified in the statute.

authorizing even more open-ended delegations of taxation power in the future.

II. Section 7005 Unconstitutionally Delegates the Power to Impose Arbitrary, Open-Ended Taxes.

This Court clearly articulated the distinction between a fee and a tax in *National Cable.* In that case, the Court held that fees can be charged only for specific services that provide benefits individually to the feepayer, benefits "not shared by other members of society." 415 U.S. at 340-341. The amount of the fees must reflect no more than the costs of providing such services. Taxes, by contrast, arbitrarily impose charges by any chosen principle to finance services that benefit the public at large. The Court elaborated, saying

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. 415 U.S. at 340 341.[10]

As discussed, *supra,* at 5-6, the DOT fees imposed under Section 7005 do not charge for specific services individually benefitting each feepayer. Rather, the fees finance Federal pipeline programs that provide broad benefits to the general public. These benefits are analogous to the public benefits of

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[10] This Court further elaborated on these principles in Federal Power Commission v. New England Power Company, 415 U.S. 345, 349-350 (1974), saying "no charges should be made for services rendered when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." *See also* National Cable Television Association v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976); Brock v. Washington Metropolitan Area Transit Authority, 796 F.2d 481 (D.C. Cir. 1986), *cert. denied,* 107 S.Ct. 1887 (1987); *In re* Jenny Lynn Mining Co., 780 F.2d 585 (6th Cir.), *cert. denied,* 106 S.Ct. 3276 (1986); Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983); City of Vanceburg, v. FERC, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied,* 439 U.S. 818 (1978).

the FCC regulations financed by the fees struck down in *National Cable*, as are the benefits from the regulatory programs financed by the NRC fees under Section 7601 and by the FERC fees under Section 7005. Indeed, as with these other statutory provisions, the activities financed by the DOT fees (*see*, *supra*, at 5-6) all provide independent public benefits. That is because the DOT fees support activities undertaken by DOT "on its own instigation in support of a general agency program expected to have a significant benefit both for the public and for private recipients as yet unidentified." *Mississippi Power and Light Co. v. NRC*, 601 F.2d 223, 231 n. 17 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). Based on *National Cable* and subsequent cases, the court in *Mississippi Power* held that such independent public benefits cannot be recovered by delegated fees. Ignoring these principles, the DOT charges arbitrarily assess the pipeline operators for these public benefits, and impose the fees based on property (miles or volume-miles of pipeline) or income (pipeline revenues). Under *National Cable* and its progeny, therefore, the DOT charges are taxes rather than user fees.

Indeed, as discussed, *supra*, at 4-5, Section 7005 delegates to DOT the discretion to determine who among pipeline operators shall be subject to any significant tax and how much each shall pay. As the decision below states,

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such tax.

Jurisdictional Statement at 10a. In other words, DOT's discretion in establishing the fees involves much more than merely issuing subordinate rules to facilitate and implement a well-defined Congressional policy. Rather, Congress has delegated

to the Department the authority to come up with "some reasonably equitable formula for spelling out each pipeline's portion of those total costs . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

The government argues that such delegations of the power to tax are not unconstitutional, as long as Congress has announced a general policy, designated the part of the Executive Branch that is to implement that policy, and set out the boundaries of the Executive's authority. Brief for the Appellant at 6. But that legal standard would leave no meaningful limitation on delegations of the power to tax. Under such a standard, Congress could delegate to the Internal Revenue Service the power to raise taxes to balance the budget each year, subject to open-ended guidelines such as "the tax burden assessed on individual taxpayers shall be reasonably related to ability to pay" or "the agency shall take into account likely impacts on the economy" or "the tax shall be assessed based on the taxpayer's income, property or consumption, or an appropriate combination thereof."

Allowing such delegations of the power to impose taxes would seriously undermine control over taxation through the democratic process. It would remove the direct accountability of elected officials for the exercise of the taxing power vested in them alone under the Constitution. U.S. Const., Art I, § 8, cl. 1. In providing that all tax bills shall originate in the House of Representatives (U.S. Const., Art. I, § 7, cl. 1), the body closest to the people where representatives are elected every two years, the Framers' intent was to maintain democratic accountability and control over the power to tax. Farrand, *The Records of the Fede. l Convention of 1787* 233 (1889) (Record of the debates at the Constitutional Convention shows that the reason for requiring tax bills to originate in the House was that "The [House] was more immediately the representatives of the people, and it was a maxim that the people ought to

hold the purse strings"). The Framers recognized that the only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions regarding taxation.[11] Indeed, they contemplated that the taxation power would be exercised by Congress and not delegated, as reflected in the constitutional provision specifically requiring that revenue-raising bills originate in the House of Representatives. *Id.* These provisions are violated when a statute delegates to an unelected bureacracy the determination of who is to be taxed and how much[12]

For these reasons, numerous cases and commentators agree that Congress cannot constitutionally delegate the power to impose taxes. *National Cable*, 415 U.S. at 340 ("Congress . . . is the sole organ for levying taxes . . . ."); *Central & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985) (charges beyond the recovery of benefits conferred upon "identifiable beneficiaries" are more "conceptually akin to taxes which could, of course, be levied only by Congress"); *Sohio Transportation Co. v. United States*, 766 F.2d 499, 503 (Fed. Cir. 1985) (the recovery of an agency's "expenditures for the public interest" through the collection of fees "would constitute an unconstitutional delegation of Congress' exclusive power to tax"); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied

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[11] *See, e.g.*, The Federalist No. 10 (Hamilton); The Federalist No. 48 (Madison); 5 Elliot, Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787, 284 (2nd ed. 1887) (Franklin); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 376, 428 (1819); Freedman, Crisis and Legitimacy: The Administrative Process and American Government 85-88 (1978); Freedman, Delegation of Power and Institutional Competence, 43 U.Chi.L.Rev. 307, 326 (1976).

[12] Allowing the taxation power to be delegated to an agency to fund its own programs tends to remove constraints and controls over government spending as well. The agency no longer faces the same burden as before in justifying its revenue demands before Congress, and therefore has less of an incentive to control costs. In addition, because the agency is no longer a burden on general revenues, Congress is likely to become less vigilant in monitoring the agency's spending.

by Congress"); *Mississippi Power & Light Co.*, 601 F.2d at 227 (affirms "the constitutional mandate that only Congress has the 'power to levy and collect taxes'"); Tribe, *American Constitutional Law* § 5-17, at 366, n.15 (2d ed. 1988) ("Therefore, it seems likely that the taxation power if it is to be exercised legitimately, may be exercised only by Congress itself"); Freedman, *Crisis and Legitimacy, supra*, n.11, at 88 ("Because no other institution of the Federal government except Congress possesses the unique characteristics that the framers relied upon to provide citizens with an institutional security against unfair or oppressive taxation, no mere delegate of Congress could aspire to exercise the power to tax in a manner qualitatively similar to Congress").

In the instant case, the government argues that the language of the Constitution does not distinguish between Article I powers, and therefore one power cannot be any more or less delegable than another. Brief for Appellant at 10-21. But, as Professor Freedman points out, certain congressional powers, in particular taxation and impeachment, are inherently nondelegable:

> When a constitutionally assigned power is by its nature pecularily resistant to the formulation of governing principles and standards, the indications become strong that the Framers placed a deep reliance for its proper exercise upon the unique qualities—the institutional competence—of the body to which it was assigned.
>
> . . . .
>
> The power of Congress to levy taxes and impeach the President are of this character.

Freedman, *Crisis and Legitimacy, supra*, n.11 at 88; *see also* Tribe, *supra*, p. 13 at 362 ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers

would not be served if Congress delegated its responsibility"). Indeed, where the Framers provided a specific procedure in the Constitution for the Congress to follow in exercising a power, as with taxation, that in itself indicates that they intended that the power not be delegated and thereby exercised by a different procedure.[13]

Even if delegation of the taxing power is not per se unconstitutional, such delegations should at least be subject to stricter requirements then other delegations, based on the concerns discussed above. *See* Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439, 443 (1980) (even if the taxing power is delegable in certain circumstances, the legislature must provide "standards more specific than normally are required to guide the exercise of agency discretion"); *Synar v. United States*, 626 F. Supp. at 1385-86 (D.D.C.) (per curiam) (constitutionality of a delegation depends upon "the scope of the power ... *plus* the specificity of the standards governing its exercise"), *cf. Florida Power & Light Co. v. U.S.* The government argues that no such stricter standard for tax delegations can be imagined or articulated. Brief for Appellant at 19. But the obvious, principled standard that comes to mind is that charges that do not meet the *National Cable* standards cannot be delegated, or at least that the authority to determine who is to be subject to the taxes and how much each is to pay over a broad range cannot be delegated.

Indeed, the delegation of discretion to choose who must pay and how much should be found impermissible even under the usual delegation standards. The delegation doctrine is an

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[13] Congress, of course, can delegate to the IRS the power to administer, enforce and implement the tax laws, through the adoption of rules and regulations if necessary. *See, e.g.*, IRS § 7805, empowering the Secretary of the Treasury to adopt "all needful rules and regulations for the enforcement of this title ...." But Congress has not and cannot delegate to the IRS the power to determine who is to be subject to the tax and how much each taxpayer is to pay. *See* Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129, 134 (1936).

important safeguard in the protection of our nation's liberties and democratic system of government.[14] But if the doctrine is to fulfill this critical role, delegations in general can be found to satisfy constitutional requirements only when Congress provides substantive standards clearly circumscribing the delegated power. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn and Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1981); Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134 (1980), Freedman, *Crisis and Legitmacy*, *supra*, n.11, at 78-94; Tribe, *supra*, p. 13, § 5-17, at 362-369. In Section 7005, and in the other agency fee statues discussed here, Congress has failed to do so.

[14] The government emphasizes that, since the 1935 decisions in Schechter Poultry Co. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), this "Court has repeatedly and uniformly upheld statutes challenged on non-delegation grounds." Brief for the Appellant at 9. But that cannot be taken to mean the doctrine has lost its vitality. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. at 685 (Rehnquist, J., concurring) reemphasizing the continuing importance of the delegation doctrine, and admonishing that

> We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted.

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(6)

No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLEE

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31pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. DELEGATIONS OF TAXING AUTHORITY LIKE THAT CONTAINED IN SECTION 7005 VIOLATE SEPARATION OF POWERS PRINCIPLES BY REQUIRING EXECUTIVE DEPARTMENTS TO MAKE CHOICES ASSIGNED BY THE CONSTITUTION TO THE LEGISLATURE 6

A. Congress Has the Responsibility to Levy Taxes 6

B. The Traditional Limits on the Executive Branch's Delegated Authority to Set and Impose Fees 10

II. CONGRESS HAS ATTEMPTED TO AVOID ITS CONSTITUTIONAL RESPONSIBILITY FOR MAKING TAX DECISIONS IN SECTION 7005 AND OTHER RECENT LEGISLATION 13

A. Congress' Delegation to the Department of Transportation in COBRA Section 7005 13

B. Congress' Delegation to the NRC in COBRA Section 7601 15

C. Congress' Delegation to the FERC in OBRA Section 3401 18

D. The Consequences of Section 7005 and Other Recent Legislation 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES: Page

Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), *aff'd,* 831 F.2d 1043 (Fed. Cir. 1987) 13

Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979) .. 12

American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 5

Board of Trustees of University of Illinois v. United States, 289 U.S. 48 (1933) 9

Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976) 12

Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985) 12

City of Vanceburg v. Federal Energy Regulatory Comm'n, 571 F.2d 630 (D.C. Cir. 1977) 12, 13

Electronic Industries Ass'n v. FCC, 554 F.2d 1109 (D.C. Cir. 1976) 12

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 9, 10

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 20

Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974) 11, 12, 17

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 23, 24

Interstate Natural Gas Association, et al. v. FERC, Nos. 87-1570 *et al.* (D.C. Cir., filed October 9, 1987) 2, 3

J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 9

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936) 8, 9

McCray v. United States, 195 U.S. 27 (1904) 7

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 7

Millard v. Roberts, 202 U.S. 429 (1906) 10

Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n, 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980) 12

TABLE OF AUTHORITIES—Continued

Page

National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976) 12
National Cable Television Ass'n v. FCC, 554 F.2d 1094 (D.C. Cir. 1976) 12
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 10, 11, 12, 14
Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) 12
New England Power Co. v. U.S. Nuclear Regulatory Comm'n, 683 F.2d 12 (1st Cir. 1982) 12
Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414 (1952) 20
Phillips Petroleum Co. v. FERC, 786 F.2d 370 (10th Cir.), *cert. denied*, 479 U.S. 823 (1986) 12
Sohio Transportation Co. v. United States, 766 F.2d 499 (Fed. Cir. 1985) 12
United States v. Norton, 91 U.S. 566 (1875) 10
United States v. Stangland, 242 F.2d 843 (7th Cir. 1957) 10

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Constitution, Art. I:

§ 7, Cl. 1 (Origination Clause) .... *passim*
§ 8, Cl. 1 (Taxing Clause) 3, 6
§ 8, Cl. 3 (Commerce Clause) 9

Natural Gas Act, 15 U.S.C. § 717 *et seq.* 2, 20
Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* 2
Federal Power Act, 16 U.S.C. § 971 *et seq.* 20
Windfall Profits Tax Act, 26 U.S.C. § 4997 8
Internal Revenue Code:

26 U.S.C. § 6301 *et seq.* 8
26 U.S.C. § 7805(a) 8

Independent Offices Appropriations Act, 31 U.S.C. § 9701, amending 31 U.S.C. § 483a .... *passim*

TABLE OF AUTHORITIES—Continued

Page

Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.* 2
Consolidated Omnibus Budget Reconciliation Act of 1985, § 7005 *et seq.*, P. L. 99-272, 100 Stat. 82 .... *passim*
Omnibus Budget Reconciliation Act of 1986, § 3401, P. L. 99-509, 100 Stat. 1890 .... *passim*
Omnibus Budget Reconciliation Act of 1987, § 5601, P. L. 100-203, 101 Stat. 1330, 42 U.S.C. § 2213 (b) 16
51 Fed. Reg. 24,078-24,082 (July 1, 1986) 16
51 Fed. Reg. 33,224-33,231 (September 18, 1986) 16
52 Fed. Reg. 3132-3137 (February 2, 1987) 19
52 Fed. Reg. 21,264-21,265 (June 5, 1987) (to be codified at 18 C.F.R. §§ 154.38, 375.306-08, 382.101-06, 382.201-03) 19

MISCELLANEOUS:

IRS Statement of Principles, Rev. Proc. 64-22, 1964-1 C.B. 689 .... 8, 9
134 Cong. Rec. H7811-H7827 (September 20, 1988) 23
H.R. Rep. No. 300, 99th Cong., 1st Sess. (1985) 15
Hearings Before a Subcomm. of the Comm. on Appropriations, 100th Cong., 2nd Sess. (1988) 21
Budget Oversight Hearing Before the Senate Committee on Energy and Natural Resources, 100th Cong., 1st Sess. (1987) 19, 20
House Conference Report No. 99-1012 18
Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Senator Alan K. Simpson, Chairman, Subcommittee on Nuclear Regulation, Committee on Environment and Public Works, United States Senate, October 1, 1985 17
5 J. Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* (3d ed. 1897) 5

TABLE OF AUTHORITIES—Continued

Page

Gillette & Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees* (May 1987) 16

L. Tribe, *American Constitutional Law* § 5-17 (2d ed. 1988) 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

The parties set out below file this brief as *amici curiae* in support of the Motion of Mid-America Pipeline Company to Affirm the judgment of the District Court.[1]

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[1] This brief is filed with consent of all parties. Pursuant to Rule 36, letters of consent from the parties have been filed with the Clerk.

Chamber of Commerce of the United States [2]
Interstate Natural Gas Association of America [3]
Central Illinois Public Service Company
Southern Company Services, Inc.
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Southern Electric Generating Company

Amici are, or represent, entities that are required to pay "annual charges" or "fees" to administrative agencies of the executive branch for the general fiscal support of these agencies. *Amici* are concerned about the emerging trend on the part of Congress to authorize agencies to assess charges to pay for general agency operations, which charges have no relationship to costs incurred with respect to or benefits conferred upon specific parties required to pay the charges.[4] Because they conduct busi-

[2] The Chamber of Commerce is the largest federation of business and professional organizations in the United States. Its membership encompasses over 180,000 companies, partnerships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber of Commerce regularly advocates its member-employers' views in court on issues of national concern to the business community.

[3] INGAA is a nonprofit national association whose members include virtually all of the major interstate natural gas transmission companies operating in the United States and three Canadian interprovincial pipelines which are categorized as Group I pipelines by the National Energy Board of Canada. Its U.S. members account for over 90% of all natural gas transported and sold for resale in interstate commerce and are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*; the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.*; and the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*

[4] Certain of the *amici* are petitioners in *Interstate Natural Gas Association, et al. v. Federal Energy Regulatory Comm'n*, Nos. 87-

ness subject to the jurisdiction of many federal agencies, *amici* are, or easily could become, subject to more of these executive branch agency taxes if Congress continues to shift responsibility for making tax decisions to the politically insulated offices of "self-financing" administrative agencies.

Amici support the judgment of the District Court striking down Section 7005 [5] in this case and wish to contribute to the resolution of the constitutional issues raised by this case.

STATEMENT OF THE CASE

Amici adopt Appellee's Statement of the Case, which fairly sets forth the facts and the relevant statutory background.

SUMMARY OF ARGUMENT

This case presents the question whether Congress may cede to an agency the fundamental decisions necessary to the exercise of the taxing power when Article I of the Constitution grants to Congress "the Power To lay and collect Taxes," (Art. I, § 8, Cl. 1), and requires that "Bills for raising Revenue . . . originate in the House of Representatives", (Art. I, § 7, Cl. 1). *Amici* maintain that the commitment of the taxing power to the legislative branch in Article I, Sections 7 and 8, reflects a conscious and fundamental allocation of responsibility by the

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1570 *et al.* (D.C. Cir., filed October 9, 1987), and the Chamber of Commerce is participating as an *amicus curiae* in *Mid-America Pipeline Co. v. Federal Energy Regulatory Commission*, No. 87-C-571E (N.D. Okla., filed July 20, 1987), challenging the constitutionality of Section 3401 of the Omnibus Budget Reconciliation Act of 1986 (discussed *infra* pp. 18-22) which authorizes the Federal Energy Regulatory Commission to impose "annual charges" sufficient to cover its entire budget. Proceedings in those cases have been held in abeyance pending the outcome of this case.

[5] Consolidated Omnibus Budget Reconciliation Act of 1985, § 7005, P.L. 99-272, 100 Stat. 82.

Framers based on their belief that the taxing power could only be constrained effectively by assigning it to the portion of the Federal Government—the House of Representatives—that was most immediately answerable to the electorate. Where the text of the Constitution itself commits a power to the legislative branch, and further describes, with specificity, the mechanics of its proper exercise, the legislature's departure from the constitutional plan must be corrected by this Court.

Congress' attempt to insulate itself from political accountability for taxing decisions and agency actions—through Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and similar enactments discussed below—distorts the constitutional plan in three important ways.

First, under the Origination Clause, it is the members of the House of Representatives, in the first instance, and then the Senate to whom concerned citizens and organizations look to establish tax policy, particularly the basic distributive formulae that determines who should pay how much. Under Section 7005, however, the House and the Senate no longer participate in these basic distributive decisions. The legislative process that the Framers intended would discipline taxing decisions is replaced by an administrative process conducted by agency officials. Indeed, the only similarity between the two processes is that because decisions involving taxation are inherently so discretionary, the particular taxing decisions of the agencies are as unreviewable in the courts as those made by the legislature itself.

Second, the Framers contemplated that the electorate would be able to cast their votes on the basis of votes cast by their elected representatives. Yet under agency self-financing mechanisms like that established by Section 7005, legislators never need to cast votes approving or disapproving the actions of administrative agencies or

the way the agencies finance those activities. The electorate is thus deprived of the opportunity to use the electoral process as a referendum on votes cast by their legislators.

Third, the approach embodied in Section 7005 dilutes substantially the budgetary oversight process. Traditionally, administrative agencies have been required to come before congressional committees annually to justify their proposed budgets for the following year. This process has been the means of thoroughly scrutinzing agency activities, priorities, and efficiencies of operation. Under Section 7005, there will be little, if any, such scrutiny. When agency requests for increased funding are accompanied by the assertion that their requests will "not cost the taxpayers a penny," there is little reason for close congressional oversight.

In short, under our constitutional system, federal legislators, not administrators, are responsible for deciding who should pay how much to finance the costs of government. These are "'quintessential legislative'" choices that "must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch." (citation omitted)[6]

ARGUMENT

Congress and this Court have long shown their fundamental concern for the uniquely legislative character of the power to tax. Central to this concern has been the recognition that "[t]axation and representation are strongly associated in the minds of the people; and they will not agree that any but their immediate representatives shall meddle with their purses." 5 J. Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* 416 (3d ed. 1897) (statement of Mr. Gerry).

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[6] *American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

The Motion to Affirm and the brief filed on the merits by Appellee Mid-America discuss in detail the historical origins of the constitutional assignment of taxing power to the legislative branch, the significance of the Origination Clause in effectuating that assignment, as well as the difference between the broad delegations of authority to administer and implement programs previously approved by this Court and the delegation of authority to choose a taxing formula under Section 7005. The statute at issue here is different from those considered in the past, not only because of the nature of the choice assigned—how and from whom taxes shall be collected—but also because it involves the taxing power and thus must be scrutinized in light of the Constitution's specific directions for the use of that authority. *Amici*, therefore, focus below on how Congress has exercised its taxing power, and the way that Congress is trying to avoid the responsibilities associated with the use of that power.

I. DELEGATIONS OF TAXING AUTHORITY LIKE THAT CONTAINED IN SECTION 7005 VIOLATE SEPARATION OF POWERS PRINCIPLES BY REQUIRING EXECUTIVE DEPARTMENTS TO MAKE CHOICES ASSIGNED BY THE CONSTITUTION TO THE LEGISLATURE

A. Congress Has the Responsibility to Levy Taxes

Article I of the Constitution places the taxing power on a different footing than most other legislative powers. Not only is the power "To lay and collect Taxes" conferred exclusively on Congress (Art. I, § 8, Cl. 1), but the mechanics of its proper exercise are purposefully set forth in unusual detail: "All Bills for raising Revenue shall originate in the House of Representatives . . ." (Art. I, § 7, Cl. 1). The inclusion of the Origination Clause in Article I was not mere fortuity—its purpose was precisely to keep taxation subject directly and immediately to democratic processes.

The requirement of the Constitution that taxes be levied by Congress reflects the fact that taxing decisions,

by nature, involve complicated political judgments not amenable to the articulation of meaningful standards and line drawing. At the root of these judgments are an array of difficult policy choices. The amount of tax and the persons or entities required to pay the tax must be identified. The degree to which a tax structure should be progressive and have redistributional aims or be fashioned to encourage or discourage certain economic behavior must be determined.

Indeed, it is in part because taxing determinations involve essentially political choices that the judicial branch has afforded Congress and the States great latitude in matters of taxation and has generally refused to review the wisdom, prudence, or ultimate "fairness" of tax legislation. As the Court explained in *McCray v. United States*, 195 U.S. 27, 59 (1904):

> Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

Judicial reluctance to interfere with congressional tax policy is not, however, an indication that the power is insignificant. On the contrary, this Court long ago recognized that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). What this judicial deference does reveal, however, is an appreciation for the inherently discretionary nature of taxing decisions and an understanding that the principal constitutional safeguard against abuse of the power to tax lies in close adherence to the separation of powers prescribed by the Constitution: "The only security against the abuse of this power, is found in the structure of the government itself." *Id.* at 428. Here that structure was embodied in the provisions of the Origination Clause. Whatever the fate of the non-

delegation doctrine in other contexts, its application in this case must acknowledge the plain language and plain intent of the Constitution.

To be sure, the Secretary of the Treasury has long been charged by Congress with the responsibility of enforcing and interpreting the tax laws. In the course of those enforcement responsibilities, the Secretary may have occasion either to interpret, or to adopt rules implementing, the Internal Revenue Code (I.R.C.). 26 U.S.C. § 7805 (a) (1988) ("all needful rules and regulations for the enforcement of this title"). The Secretary has been given by Congress considerable latitude in overseeing and developing tax collection policy and procedure. *See* I.R.C. § 6301 *et seq.* (1988).

The scope, however, of the Secretary of the Treasury's application of the Code has been restricted to matters of administration and enforcement.[7] Accordingly, this Court has taken care to emphasize that the Secretary's power to promulgate regulations "for the enforcement of this title" is not the power to legislate or to make the fundamental choices associated with tax legislation. As the Court explained in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936), the power "to prescribe rules and regulations . . . is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." The Internal Revenue Service's own Statement of Principles echoes the point:

> The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress. With

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[7] The Government relies upon a section of the Windfall Profits Tax Act, 26 U.S.C. § 4997, as evidencing a broad delegation of taxing power. Brief for the Appellant, p. 10, n.5. However, that Act granted the Secretary no authority to specify the types of crude oil that would be subject to the tax or the tax rates.

> this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; *to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them*; and to perform this work in a fair and impartial manner. . . .

Rev. Proc. 64-22, 1964-1 C.B. 689 (emphasis added).

The Service's authority to "interpret" the Code in applying it is a classic example of delegation to an agency "to fill in the details" and apply a congressionally made policy choice to myriad factual contexts. By contrast, and as the Court's statement in *Manhattan General Equipment* suggests, what Congress has never delegated to the Secretary of the Treasury is the basic authority to determine who is to be taxed and to set tax rates. The basic choices must be made by Congress.

Section 7005, by contrast, does not present the Secretary of Transportation with a complete congressional determination that need only be interpreted and applied to specific facts. Section 7005 presents the Secretary with the task of deciding how a specified revenue objective is to be collected and from whom, the essential distributive decisions at the heart of the taxation power.

The Government likens the taxing delegation at issue under Section 7005 with the delegation to the President to set import duties at issue in *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) and *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). Those cases are distinguishable. Both involved regulation of foreign commerce as to which the Congress has distinct powers to impose duties under Article I, § 8, Cl. 3.[8] Both involved classically permissible delegations. In *J. W. Hampton*, Congress established base tariff rates but gave the President the power to adjust

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[8] *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 58 (1933).

them to equalize the costs of domestic and foreign goods as conditions changed over time. *Algonquin SNG* involved import fees on products found to threaten to impair national security and "articulation of standards to guide the President in making the decision whether to act." 426 U.S. at 559, n.10. *Algonquin SNG*, moreover, did not involve a tax or revenue measure subject to the Origination Clause since the principal purpose of the statute was to protect national security.[9] The delegations made here—how should taxes be assessed and on whom—are much broader, and involve choices that Congress should have made.

B. The Traditional Limits on the Executive Branch's Delegated Authority to Set and Impose Fees

Since at least 1952, Congress has provided general authorization to agencies to impose "fees" to recover costs incurred by the agency in providing services requested by and provided to given firms. In particular, the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (IOAA)—the general federal "user fee" statute—authorizes administrative agencies to recoup the costs of providing special benefits to specific beneficiaries that request agency services. The notion of "fees" rests on the common-sense distinction between agency charges for services rendered by an agency for a firm or person, and agency action that may be characterized as benefiting primarily the public at large (which is properly the subject of taxation). A fee is a *quid pro quo* for services rendered.

In 1970, however, at Congress' specific urging,[10] the Federal Communications Commission (FCC) devised a

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[9] *See Millard v. Roberts*, 202 U.S. 429 (1906); *United States v. Norton*, 91 U.S. 566 (1875) (dictum); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957).

[10] *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 339 (1974), *quoting* H.R. Conf. Rep. No. 91-649, p. 6.

schedule of IOAA fees aimed at recovering the agency's entire regulatory budget. Relying on the provisions of the IOAA directing agencies to become "self-sustaining to the full[est] extent possible," *National Cable Television Ass'n v. United States*, 415 U.S. 336, 337 (1974), the FCC acted to implement the congressional plan. At about the same time, the Federal Power Commission (FPC) devised a similar "fee" schedule that would allow it to recover from its jurisdictional utilities all of its costs of administering various federal energy programs.

Citing the constitutional concerns that would arise if Congress had, in fact, sought to avoid its constitutional responsibility for levying taxes by allowing agencies to do so, this Court invalidated both the FCC's and the FPC's proposed fee schedules. *National Cable Television; Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). Despite the expansive language of the IOAA,[11] this Court found that the proper scope of agency activities was limited to the determination and exaction of "fees"—assessments "incident to a voluntary act" which specifically relate to a benefit "not shared by other members of society." *National Cable Television*, 415 U.S. at 340-41. The Court reasoned that general charges, not specifically correlated to the cost of providing an identifiable benefit, are "taxes." Because Congress "is the

[11] The Independent Offices Appropriations Act, 1952, Subtitle 5, 65 Stat. 290, 31 U.S.C. § 483a, provided in relevant part:

> It is the sense of the Congress that *any work, service* . . . *benefit*, . . . license, . . . or similar thing of value or utility performed, furnished, provided, [or] granted . . . by any Federal agency . . . *shall be self-sustaining to the full extent possible*, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable *taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served*, and other pertinent facts . . . .

(emphasis added), later amended by 31 U.S.C. § 9701.

sole organ" with the power to impose taxes, the Court concluded that a narrowing construction of the IOAA was necessary to avoid the constitutional problems raised by bestowing the power to tax on federal agencies. To do otherwise would "carr[y] an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341.

In the decade and a half since *National Cable Television* and *New England Power* were decided, the historical distinction between fees—which agencies may impose under various statutes—and levying taxes—which they may not—has guided the lower federal courts not only in evaluating fee schedules issued pursuant to the IOAA [12] but also in construing other federal statutes in which Congress has conferred upon agencies the authority to recoup expenses for specific services requested and rendered.[13] Implicit in these cases is the recognition

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[12] *See, e.g., Phillips Petroleum Co. v. Federal Energy Regulatory Comm'n,* 786 F.2d 370 (10th Cir.), *cert. denied,* 479 U.S. 823 (1986); *Central & Southern Motor Freight Tariff Ass'n v. United States,* 777 F.2d 722 (D.C. Cir. 1985); *Mississippi Power & Light Co. v. Nuclear Regulatory Comm'n,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); *National Ass'n of Broadcasters v. Federal Communications Comm'n,* 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC,* 554 F.2d 1135 (D.C. Cir. 1976); *New England Power Co. v. Nuclear Regulatory Comm'n,* 683 F.2d 12 (1st Cir. 1982); *Electronic Industries Ass'n v. FCC,* 554 F.2d 1109 (D.C. Cir. 1976); *National Cable Television Ass'n v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976).

[13] *See Sohio Transportation Co. v. United States,* 766 F.2d 499, 502-504 (Fed. Cir. 1985) (applying *National Cable Television* to a revenue-raising delegation in the Mineral Leasing Act); *Nevada Power Co. v. Watt,* 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable Television* to a revenue-raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus,* 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg v. Federal Energy Regulatory Comm'n,* 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable Television* to a revenue-raising dele-

that federal agencies are well-suited to assess the costs and value of specific services that they perform and to set fees for those services. However, "expert" administrative bodies are less able than elected representatives to address the political decisions inherent in assessing taxes because administrative bodies are not directly accountable to the electorate. In the context of taxing decisions, a "fair and equitable" standard, or a "reasonable relationship" standard, does little or nothing to constrain the range of policy choices that necessarily go into allocating the taxing burden.

II. CONGRESS HAS ATTEMPTED TO AVOID ITS CONSTITUTIONAL RESPONSIBILITY FOR MAKING TAX DECISIONS IN SECTION 7005 AND OTHER RECENT LEGISLATION

Congress in the COBRA and the Omnibus Budget Reconciliation Act of 1986 (OBRA), departed from the constitutional limitations governing the Executive's capacity to raise revenue. In these acts, Congress directed various federal agencies to finance their own regulatory activities by devising "fair and equitable" annual charges or "fees." The three most prominent provisions—COBRA Section 7005 ("Pipeline safety user fees"), COBRA Section 7601 ("NRC annual charges"), and OBRA Section 3401 ("FERC fees and annual charges")—aptly illustrate this legislative device and the degree to which Congress is finding it increasingly expedient to leave basic taxing decisions to administrative agencies.

A. Congress' Delegation to the Department of Transportation in COBRA Section 7005

Section 7005 of COBRA—at issue in this case—authorizes the Department of Transportation (DOT) to establish a "schedule of fees" by calculating and impos-

gation in the Federal Water Power Act), *cert. denied*, 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States*, 9 Cl. Ct. 723, 738-39 (1986) (same), *aff'd*, 831 F.2d 1043 (Fed. Cir. 1987).

ing annual assessments on pipelines sufficient to recoup all of the costs associated with DOT's pipeline regulatory programs. The operation of these programs would effectively become self-financing, with the agency administering the program also arranging for its financing. Congress has left it to the Secretary to devise a schedule of assessments "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1). The departure from conventional practice is quite clear.

First, unlike fees as generally understood, Section 7005 assessments are levied against entities that receive no identifiable benefits from the agency. DOT's role vis-a-vis pipelines is a *policing* one—*viz.*, to ensure that DOT safety standards are adhered to through a system of testing and inspections. The purpose of its pipeline safety programs is to offer protective services to the public. The regulations limit the activities of the pipelines; the costs taxed against the pipeline industry include the cost of rulemaking to limit pipeline activities or enforce the law against them. In short, whatever the merit of the underlying safety programs being financed, the purpose of these exactions is plainly to benefit the public generally, not the payers of the "fees," who are arguably its victims—or at least its objects. DOT's pipeline safety program does not confer a special benefit on pipelines "not shared by other members of society." *National Cable Television*, 415 U.S. at 341.[14]

Second, there is no requirement in Section 7005 that charges reflect either the "value to the recipient" or "costs to the government" of services provided. IOAA,

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[14] Congress, of course, has the power to tax. The point is that if Congress does elect to tax an industry for the costs of regulating it, it cannot then pass on to the agency the equally discretionary—and fundamentally legislative—decision as to how fairly to allocate that taxing burden among those to be taxed.

31 U.S.C. § 483a. Rather, Section 7005 assessments are designed to recover *all* costs associated with these regulatory programs, including salaries, overhead, administrative costs, collection costs, and an array of other costs unrelated to the provision of any benefit to pipelines. Under these circumstances, these assessments are clearly for the general support of government and not fees incident to a voluntary request for agency service.

Third, and most importantly, in Section 7005, Congress confers upon the agency the discretion to determine tax liability, *i.e.*, to select "some reasonably equitable formula for spelling out each pipeline's portion of those total costs . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985). Although the statute refers to a "usage" standard, usage is simply one general basis for levying any tax. The Secretary is authorized to make the essential choice of selecting the operative criteria for levying the tax based upon "volume-miles, miles, revenues, or an appropriate combination thereof." Congress itself disavowed its obligation to determine the basis for the tax, leaving the choice of a "reasonably equitable" formula to the Secretary.

B. Congress' Delegation to the NRC in COBRA Section 7601

Section 7601 of COBRA directs the Nuclear Regulatory Commission (NRC), within 90 days after enactment, to develop a system to assess and collect annual fees from the NRC's licensees which would "fund all or part of the activities conducted by the Commission," and to provide Congress with a report. Under Section 7601 (b)(1), the NRC was required, within 45 days of its report, to impose annual charges on "its licensees" through rulemaking. Congress imposed only three limitations on the NRC in carrying out its revenue-raising task: (1) the aggregate annual fees plus other amounts

collected (*e.g.*, under the IOAA) may not exceed 33 percent of the NRC's fiscal year costs,[15] (2) the annual charges must be "reasonably related to the regulatory service provided by the Commission," and (3) the charges "shall fairly reflect the cost to the Commission of providing such service." [16]

This "fee" provision illustrates the basic departure from the concept of "fees" as defined in *National Cable Television.*[17] First, NRC "fees" are not imposed in di-

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[15] The amount was increased to 45 percent in 1987. Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330, § 5601, 42 U.S.C. § 2213(b) (1988).

[16] The NRC issued its rule adopting annual fees under COBRA Section 7601(b) on September 18, 1986. 51 Fed. Reg. 33,224. To calculate the annual charges, the NRC used a "cost basis" comprised of the cost of all the NRC programs and activities for which the NRC sought recovery through the annual charges. 51 Fed. Reg. 24,078-24,082 (July 1, 1986); 51 Fed. Reg. 33,224-33,231 (Sept. 18, 1986). In large measure, these costs relate to programs and activities that serve broad public purposes, such as public health and safety objectives, and are essentially the cost of regulation, or of activities supporting regulation.

For example, out of $124 million in the total cost basis, most, $74 million, is for research activities to promote a rise in the general level of knowledge. 51 Fed. Reg. 33,226.

[17] The point was well expressed by the authors of a recent report to the Administrative Conference of the United States:

> Insofar as authorizations such as that conferred on the NRC require no linkage to particular benefits, there is no reason to believe that fees will induce an appropriate level of regulation or request for government services. To the contrary, any relationship between fees imposed and appropriate levels of services provided may be wholly coincidental. The user fee in this situation has become largely a revenue raising device imposed on particular recipients of governmental service. Such a revenue raising device, although denominated a charge or user fee, is indistinguishable from a redistributional tax.

Gillette & Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees* (May 1987).

rect exchange for requested service. Congress has altogether eliminated the *quid pro quo* requirement that is the *sine qua non* of a traditional fee. What triggers the imposition of a Section 7601 annual fee is not any specific request for service or agency action, but merely the fact of being subject to the Commission's jurisdiction. As a result, there is no necessary correlation between the value of agency services a licensee may receive and its fees. *See New England Power*, 415 U.S. at 351 (striking down FPC fees because, *inter alia*, "[s]ome of the assessments made by the Commission under its formula would be on companies which had no proceedings before the Commission during the year in question"). Moreover, under the rule, all licensees subject to the fee are charged the same amount per reactor despite substantial differences, such as the age, size, type, and output of their reactors.

Second, Section 7601 illustrates the range of discretion Congress is willing to give to an agency in determining the objects of taxation. Under Section 7601, the NRC was given the discretion to, and has in fact elected to, impose fees only against certain entities within its regulatory jurisdiction and not others. Thus, the NRC has elected to impose annual charges on those who possess a license to operate a nuclear power reactor, but has excluded entirely from the annual charges major nuclear material licensees (including large uranium processing operations), nuclear power related vendors, small materials licensees, and research reactor licensees. The NRC itself advised Congress that Section 7601 provides a "very broad legislative delegation of fee-setting authority without any controlling standards.." [18]

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[18] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Senator Alan K. Simpson, Chairman, Subcommittee on Nuclear Regulation, Committee on Environment and Public Works, United States Senate, October 1, 1985.

C. Congress' Delegation to the FERC in OBRA Section 3401

The Omnibus Budget Reconciliation Act of 1986 (OBRA), P. L. 99-509, § 3401, 100 Stat. 1890, following one year after Sections 7005 and 7601 of COBRA, makes the Federal Energy Regulatory Commission (FERC) an entirely self-financing federal regulatory agency. Section 3401, like Sections 7005 and 7601, brings the constitutional difficulties associated with this legislative development into sharp focus: Congress has given the agency virtually complete discretion to (1) select the objects of taxation and (2) devise its own taxing agenda subject only to the requirement that the exactions by which it finances its regulatory activities be "fair and equitable."

Specifically, Section 3401 gives FERC the power to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." Section 3401(a). The only standard Congress sets forth in the statute to guide FERC's formulation is the instruction that the charges be "fair and equitable." Section 3401(b). Similarly, Section 3401 commits to FERC's discretion decisions concerning which entities or classes of entities from among those regulated by the agency are to be taxed. As the legislative history explains, Congress elected to allow FERC to "specify the specific classes of entities subject to annual charges or fees. . . ." House Conference Report No. 99-1012 at 239.[19] Thus, decisions regarding the

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[19] To implement Section 3401, on January 28, 1987, the FERC issued a Notice of Proposed Rulemaking (NOPR), in which it proposed to recover, through annual charges, all costs not recouped through existing IOAA filings and FPA assessments. To create the required procedure, the FERC determined:

(1) who would be billed;

(2) the allocation of its costs among its regulatory programs;

[Continued]

basis on which these charges should be calculated, and how FERC's budgetary costs should be fairly apportioned among those entities to be taxed, are left entirely to FERC's discretion.

The costs which Section 3401 directs FERC to recoup encompass the entire range of costs incurred by the agency in performing its regulatory functions. Indeed, since FERC already recovers through IOAA such fees as it believes are its direct costs for services rendered, the primary aim of Section 3401 charges is to finance the agency's indirect costs, that is, the cost of salaries, pensions, rent, and administrative overhead such as telephone and computer support.[20]

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[19] [Continued]

(3) the allocation of each regulatory program's direct and indirect costs among companies regulated under each program; and

(4) the standards for waiving all or part of an annual charge.

FERC proposed to assess annual charges against only three types of companies: public utilities, interstate natural gas pipelines, and interstate oil pipelines. Other FERC-regulated entities would be exempt, including: intrastate natural gas pipelines, natural gas producers, certain liquefied natural gas importers, certain smaller natural gas pipelines, appellants from Department of Energy proceedings, power marketing agencies, electric co-generators and small electric power producers. 52 Fed. Reg. 3132, 3135-37. Payments due from non-exempt entities would be increased to cover the revenues lost through such exemptions. *Id.* at 3132, 3134-35 & 3137.

The final rule promulgated by the FERC and made effective on May 29, 1987, adopted most elements of the NOPR respecting the types of entities to be billed under Section 3401, the estimation and allocation of program costs, adjustments for under or over recovery of fees and the standards for waiving all or part of the annual charges. 52 Fed. Reg. 21,263-21,265 (June 5, 1987) (to be codified at 18 C.F.R. § 154.38, 375.306-08, 382.101-06, 382.201-03).

[20] Such "indirect" administrative costs made up about eighty-seven percent of FERC's 1988 budget, according to FERC Chairperson Martha O. Hesse. *See* Budget Oversight Hearing Before the Senate Committee on Energy and Natural Resources, 100th Cong.,

FERC is a federal agency whose purpose, policies, and programs are designed to promote the public good.[21] Thus, whatever incidental benefits might be received by companies regulated by the FERC, the public is the intended beneficiary of most of the FERC's activities.

Experience under the FERC "annual charge" statute demonstrates how an agency can assuage congressional fears about increased spending levels, enforcement priorities, and even administrative efficiency and waste, simply by reiterating the point that the agency needs no tax dollars because it is covering its costs of operation by imposing "fees" on those it regulates. When FERC Chairman Martha O. Hesse went before the House of Representatives Appropriations Committee in March of 1988, the first point she made in addressing possible concern about FERC's $7 million increased spending request was that FERC is now, by virtue of OBRA Section 3401, a self-sustaining agency:

1st Sess. (1987) (Statement of Martha O. Hesse, Chairperson of the Federal Energy Regulatory Commission). With the ability to recover all of its budget through annual charges, FERC clearly has less incentive to track cost incurrence and to collect in direct fees the costs actually attributable to a particular regulatee. This results in those who use more FERC services being subsidized by those who use FERC less, or not at all.

[21] The range of activities that FERC undertakes and is responsible for in promoting the public interest provides a clear indication of how far Congress has gone to seek revenue from a few to provide government services for all. In adopting the Federal Power Act, 16 U.S.C. §§ 791 *et seq.* and the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, the Congress sought to protect the consumer interest through provisions to assure adequate and reliable supplies of energy at the lowest reasonable cost. This Court has often noted that a primary purpose of both the Federal Power Act and the Natural Gas Act is to "protect . . . consumers" from excessive charges, *e.g.*, *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414, 418 (1952); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

> Beginning this fiscal year, the commission is recovering its entire budget through annual charges and fees paid by the industries that we regulate. As a result, I'm pleased to report that the commission is now . . . a totally self-supporting agency.
>
> Within this framework, our proposed 1989 budget, while at most $7 million more than that approved by Congress for the current fiscal year, will not cost the U.S. Treasury or the American taxpayer any additional funds.

Hearings Before a Subcomm. of the Comm. on Appropriations, 100th Cong., 2nd Sess. 1 (1988).[22]

When agencies have the capacity to finance themselves, and can appease the concerns of the Appropriations Committees by insisting that budget growth will require "no new taxes", the net result is a marked loss of Congressional policy oversight and spending discipline. Executive branch respect for the power of the purse must not be lost because Congress desires to escape accountability

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[22] The following colloquy ensued:

> Mr. BEVILL. Did I understand you to say $7 million above the amount that you received in appropriations.
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> Ms. HESSE. For the current fiscal year.
>
> Mr. BEVILL. Yes.
>
> Ms. HESSE. Yes.
>
> Mr. BEVILL. So you got shortchanged about $7 million.
>
> Ms. HESSE. I don't feel that we were shortchanged. We have enough money.
>
> Mr. BEVILL. Well, you're the only one. We are volunteering you to help contribute to the reduction of the deficit.
>
> Ms. HESSE. I'm pleased to do my part. I don't know how many—[Laughter.]
>
> Ms. HESSE. [continuing]. How many other independent regulatory agencies are self-supporting, but we are.
>
> Mr. BEVILL. I do think that's commendable. We don't have many agencies come before us that are self-sustaining.
>
> Ms. HESSE. Yes, FY 1988 was the first year.
>
> Mr. BEVILL. Well, I think that's commendable. I hope that catches on with all these other agencies.

for the fundamental taxing and spending decisions entrusted to it by the Constitution.

D. The Consequences of Section 7005 and Other Recent Legislation

Section 7005 changes the process by which interested parties may affect taxing decisions by channeling those decisions through an administrative, rather than legislative, process. Precisely because of the intrinsically political nature of taxing decisions—because they often involve equitable choices, rather than expertise—they have historically been well-handled by the political process. The Framers assuredly intended electoral accountability for taxing decisions to be the primary constraint on the feared propensity of the Government to increase taxes.[23]

Even on its own terms, however, the administrative alternative is less than satisfactory as a substitute for political decisionmaking. One element of administrative decisionmaking that is deemed part of the fair exchange for the right to have a matter determined legislatively, is the right of judicial review to supplement the review by the administrative agency itself. In matters of taxation, however, it is well understood that the political nature of the relevant determination renders the ultimate decision virtually unreviewable in a court of law. Moreover, as Professor Tribe has noted, "[t]he same discretionary character of taxation that ordinarily shields it from effective judicial review would also make legislative oversight of a delegate difficult." L. Tribe, *American Constitutional Law* § 5-17, n. 15 (1988).

[23] By calling taxes something else, and by asking unelected officials within diverse federal agencies to decide how and upon whom these exactions are to be imposed, legislators can effectively take credit for doing something to reduce the deficit without at the same time being accountable for directly increasing anyone's tax liability.

Beyond the fact that unelected administrative officials are a constitutionally inadequate substitute for congressmen, the electorate is deprived of its right to use popular election—particularly the biennual election of representatives in the House—as a referendum on the legislator's vote on a given taxing issue or issues. Those in Congress who might otherwise be counted as supporters of higher taxes can rightly point out that the burden and timing of new taxes is the result of regulatory action. While not every taxing decision may be unpopular or corrosive of public support, the incentive to disguise taxes in this way is politically irresistable. The Framers may not have foreseen such a ploy, but its use is no doubt inconsistent with the spirit and letter of Article I of the Constitution.

A less obvious, but equally serious, danger in "taxation by delegation" is the way in which it may loosen congressional oversight and control over agency spending. That the taxing and spending powers are grouped together in Article I is no accident. Congress's ability (and willingness) to control spending and oversight effectively hinges on the fact that increased governmental expenditure ultimately requires Congress to answer to its constituents for more tax revenues.

CONCLUSION

Congress has gone too far in seeking to avoid difficult taxing decisions by granting to federal agencies the power to finance the direct and indirect costs of particular programs (as under Sections 7005 and 7601) or of all the agency's activities (as under Section 3401). The Environmental Protection Agency and the Consumer Product Safety Commission may be in line to receive similar authority.[24] To paraphrase the Court's *Chadha* reasoning, this Court's "inquiry is sharpened rather than blunted by the fact that [these] provisions are appearing

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[24] 134 Cong. Rec. H7811-H7827 (September 20, 1988).

with increasing frequency in statutes which delegate authority to executive and independent agencies." *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 944 (1983). As set out above, this device of delegation of the taxing power, and administrative levys now being pursued by Congress has significant consequences for the electorate's control both over taxing decisions and over the activities of administrative agencies. The change reflected in Section 7005 is inconsistent with the text of the Constitution and its premises. Thus, the District Court's judgment should be affirmed.

Respectfully submitted,

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